IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

W. A. MORRIS,

Complainant and Appellee,

vs.

J. N. BEAN, W. R. BAINBRIDGE, BERT BENT, WALLACE BENT, CORBETT BENNETT, (Appellants), JOHN SADRING, L. O. DIETZ, ALLEN P. GRAHAM, WILLIAM RILEY, CURTIN BEELER, CHARLES INGRAM, O. BUNYAN, WILLIAM SHOLTZ, C. E. STEELE, JOHN RHODES, F. SANDERSOE, O. S. ERICKSON, TILMAN C. GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN BOWLER, J. A. KING, A. HOLM, C. H. YOUNG, and MICHAEL WROTE, (Appellees),

Defendants,

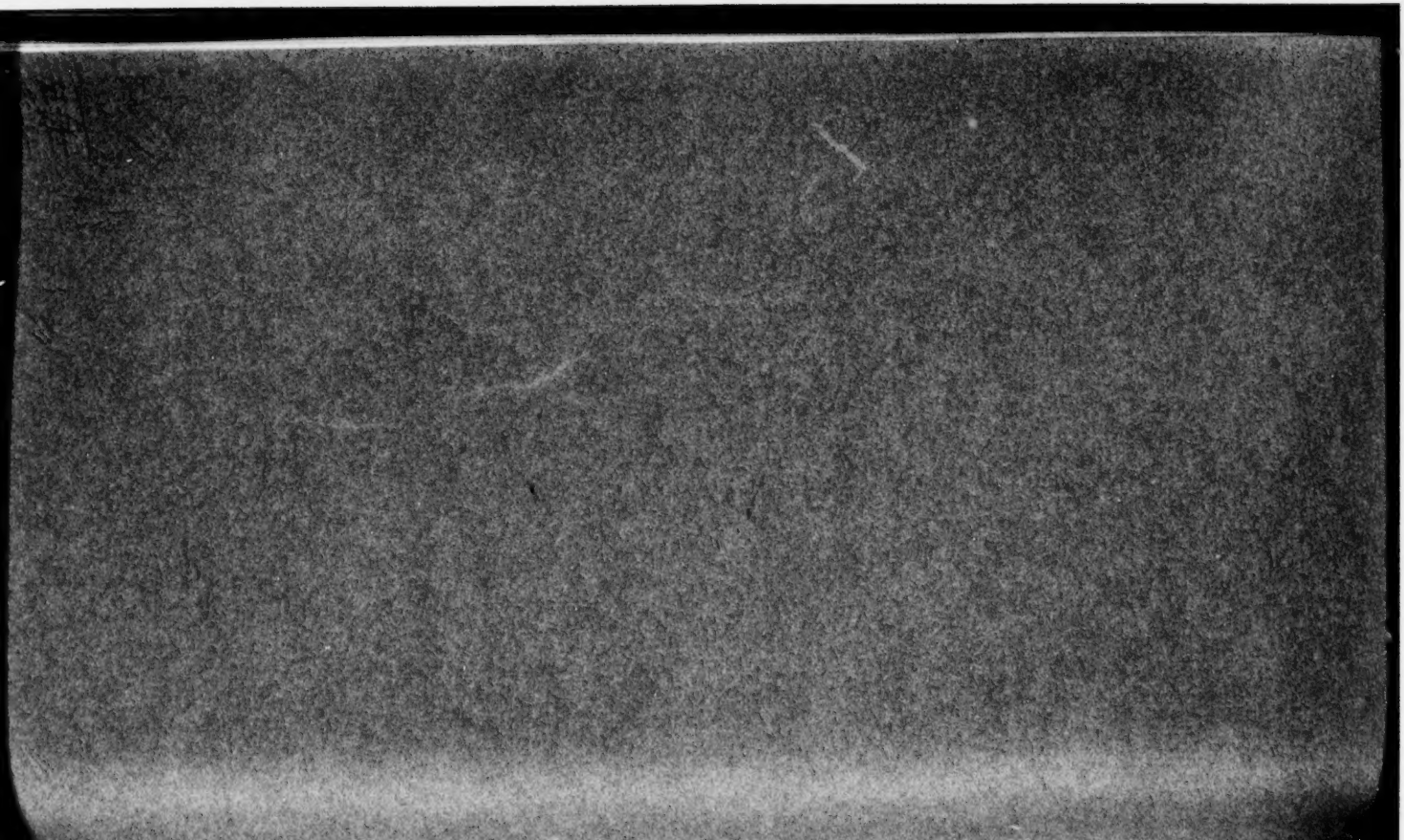
T. N. HOWELL,

Intervenor and Appellee.

BRIEF OF APPELLANTS.

GEORGE W. PIERSON and
WALSH & NOLAN,
Solicitors for Appellants.

T. J. WALSH,
Of Counsel.



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I.

STATEMENT OF FACTS.

This is an appeal from a final decree in equity entered in the Circuit Court of the United States, for the District of Montana. Suit was begun by the complainant alleg-

ing himself to be a citizen of Wyoming, and having therein acquired a water right of 250 inches, miner's measurement, in the year 1887, by diverting on to lands then occupied and now owned by him in that state, the waters of Sage Creek, such diversion having been made in the state of Wyoming, though the said Sage Creek has its source in the county of Carbon, state of Montana, through which it flows across the state line into Wyoming. He averred that the defendants, citizens of the state of Montana, had in irrigating seasons of three years prior to the commencement of this suit (January 20, 1903), in the state of Montana, diverted the waters of said Sage Creek at points on the stream above his point of diversion, and had also diverted the waters of Piney Creek, a tributary of said creek, emptying into it above the head of his ditch, such diversion also taking place in the state of Montana, such acts resulting in damage to him in the sum of $2500. He prayed for an injunction and for damages.

Transcript, pages 3 to 10.

The defendants Bean, Bainbridge, Bert Bent, Wallace Bent and Corbett Bennett, answered denying that the complainant made any appropriation antedating the month of November, 1895. They admitted the diversion as charged, but denied that complainant had suffered any damage.

They further severally averred appropriations by themselves of the waters of Sage Creek and Piney Creek, in the state of Montana, for the irrigation of lands owned or occupied by them in Montana, through ditches in Montana. The lands in each instance were alleged to be unsurveyed public lands, which would be subject to entry

under the homestead laws when surveyed. That each of the answering defendants is a qualified homesteader, and that he intends to enter the lands occupied by him as soon as the same shall be surveyed. They averred that each, relying on his appropriation, cultivated his lands and improved them by the erection of houses, barns, etc., and that the lands are unproductive and valueless, unless they can be irrigated. They averred further the adverse use of the waters during the irrigation season for a period of more than ten years, and further said that by reason of the peculiar condition of the bed of Sage Creek and its tributaries the water sinks in places and rises in others, and that in consequence, notwithstanding any acts of the defendants, the complainant has had as much water during the period of which he complains as he ever used.

They prayed that no injunction be issued, but that if any should be, the rights of the defendants be determined and that they be restrained in the order of their priority.

Transcript, pages 22 to 42.

The defendants Graham, Wrote, Eley and Young answered similarly.

Transcript, pages 43 to 56.

The other defendants defaulted.

Before answering, however, the appealing defendants filed a plea to the effect that there were across Sage Creek, in the county of Carbon, State of Montana, for the purpose of diverting its waters, dams maintained by A. W. Adams, Nellie Bowler, John Frost and the Burlington and Quincy Railroad, and that though the defendants should be restrained from diverting the water of

Sage Creek or its tributaries, none of the water flowing therein will reach the ditch of the complainant because it will all be taken from the stream by the parties last above named, who, it was asked, should be made parties to the action.

Transcript, pages 14 to 16.

The plea and prayer was overruled. After the answers referred to had been made, one T. N. Howell was permitted to intervene,

Transcript, page 57,

the complainant expressly consenting.

Transcript, page 69.

This order having been made, the solicitors for complainant became, as well, solicitors for the intervenor, and the case was prosecuted by the complainant and the intervenor jointly. Thus, the stipulations preceding the depositions, set forth in the transcript, are all signed by such solicitors, both for the complainant and for the intervenor, and an inspection of the testimony taken by oral examination shows that the direct and the cross-examination, on behalf of complainant and intervenor, was conducted by these same solicitors.

Transcript, page 181.

The averments of intervenor's petition were of the same general character as those made by the complainant in his bill, his appropriation being alleged to be 6 1-4 cubic feet per second. He averred a Wyoming appropriation for the irrigation of lands in Wyoming, and declared himself to be a citizen of that state. That his use of the water was adverse and under a claim of right of priority over the defendants, but subject to the right of the complainant to 6 1-4 cubic feet, which he admitted.

The intervenor further alleged that he had enjoyed the use of the water without disturbance by any one until about two years before the filing of his petition in intervention, when the defendants began to use water in Montana to such an extent that he has been unable to get any water. He prayed for a decree establishing his right, and for an injunction and damages against the defendants.

Transcript, pages 58 to 67.

Answers were made by the same answering defendants, identical in general character with their answers to the bill, and specifically putting in issue intervenor's allegation of his Wyoming citizenship, and averring, on information and belief, that he is a citizen of Montana.

Transcript, pages 76 to 100.

Issues were joined by the general replication and the cause referred to a master to take testimony. He reported that the complainant had not complied with the laws of the State of Wyoming in making his appropriation, and could take nothing; that the intervenor had a prior right to the waters of Sage Creek to the extent of 110 inches; that the jurisdiction of the court depended on the citizenship of the complainant, not the intervenor, whose citizenship was not found, and that he was entitled to a decree establishing his right to the waters of Sage reek to the extent of 110 inches.

Transcript, pages 124 to 134.

On the incoming of his report the court set aside his finding as to the failure of complainant to acquire a water right by reason of non-observance of the Wyoming law, upheld the conclusion that the intervenor's citizenship was immaterial, and directed a decree awarding 100

inches of the waters of Sage Creek to the complainant and 110 to the intervenor, enjoining defendants from diverting so much as that the amounts stated could not be obtained from Sage Creek by the complainant and the intervenor respectively, but denying damages.

Transcript, pages 630 to 657.

A decree was entered accordingly,

Transcript, pages 178 to 180,

from which an appeal was duly allowed.

Transcript, pages 673-674.

The court found, among other things, also, that Sage Creek has its source in the Pryor mountains, Carbon County, Montana, and flows in a general southerly direction through a portion of Carbon County to and across the dividing line between Montana and Wyoming into the last mentioned state, where it falls into the Stinking Water river,

Transcript, page 166,

and that the appropriation of the intervenor (and necessarily of the complainant) was made at a time when all of the territory drained by Sage Creek and its tributaries was a part of the Crow Reservation.

Transcript, page 439.

This, of course, means in Montana, since the south line of Montana was the south line of the Reservation.

Revision of Indian Treaties p. 327-328;

The court found further against the claim of adverse user, of estoppel, and of abandonment made by the defendants.

Transcript, pages 163 to 177.

EXTENT OF COMPLAINANT'S RIGHT.

The complainant testified to having taken out his ditch; that he kept on increasing his irrigated area until he had, "four or five years ago" (that is by the year 1900 or 1901) 100 acres of alfalfa and grain in cultivation; that his ditch covers 120 acres and that he irrigates 160 acres with it.

Transcript, pages 278 to 308.

Passing the contradictions of this statement the evidence is overwhelming that he has never irrigated, at any time, more than 25 acres. Although many witnesses were called he is not corroborated as to the extent of his irrigated area by any of them. Even the surveyor called by the plaintiff did not commit himself on this point, simply saying that complainant's land *could* be watered by his ditch with laterals constructed from it, and that he saw evidences of irrigation on the place,—the extent of which he significantly omits to say.

Transcript, pages 201, 211-212.

On the other hand, the witness Hine made an actual survey of the land under the ditch and found it to be 21 acres and 43 rods, with a small garden patch, in all estimated by him to contain 22 to 23 acres.

Transcript, pages 402-403.

There is nothing to show that any more of the land has ever been irrigated, except that the witness Godfrey testified that in 1889 complainant had 40 acres under cultivation, and that this increased, but he could not say how much.

Transcript, pages 316-317.

The witness Martin testified that he thought that the Morris ranch was irrigated in 1899, but he did not say

how much.

Transcript, page 386.

The witness Medhurst testified that only three acres were irrigated in 1885, before Morris came; that there was very little water from '83 to '85, and that the place could not be irrigated to any great extent, because very little water would reach the place.

Transcript, page 440.

The witness Bean says that 25 acres were under cultivation, and the witness Bennett, both of whom assisted Mr. Hine in making the survey of the Morris place, estimated the amount under cultivation as 20 to 25 acres, with the addition of a small garden. The rest of the 160 acres had not been cultivated, and were covered with grease wood, from a foot high to as high as a person's head; that there are sand dunes there, and it showed no sign of ever having been cultivated.

Transcript, pages 457-458.

The witness S. W. Bent stated that perhaps 60 acres might be irrigated, out of the 160, but that only 20 to 25 had actually been irrigated, and that the rest was covered with sage brush.

Transcript, page 477.

Wallace Bent also testified that that part of Morris' land lying west of the creek has never been cultivated, and is covered only with grease wood and sage brush.

Transcript, page 491.

EXTENT OF INTERVENOR'S RIGHT.

The same witness Hine testified that there were not more than 110 acres under the intervenor's ditch; that the remaining part of his 200 acres is hilly, and could not possibly be irrigated. It seems that the court

must have awarded the intervenor 110 inches on the strength of these statements.

Transcript, page 403.

Bean also corroborates these statements.

Transcript, page 441.

Corbett Bennett stated that the intervenor's land showed no signs of having ever been cultivated; the ditches looked as if they had never been used. He also states that only 110 acres could be covered by the ditch; that the rest lies on a gravel hill or ridge and could not be covered by the ditch.

Transcript, pages 458-460.

The witness S. W. Bent estimated that three forties could be irrigated, but that eighty acres could not, as they are too high to be reached with water.

Transcript, page 477.

LACHES, ABANDONMENT AND STATUTE OF LIMITATIONS.

The intervenor testifies that he cultivated his land in 1891 and 1892, and raised a splendid crop in 1893; that he put in a big crop in 1894, but that the defendants took the water in June, and the crop dried up. He put in another crop in 1895, but that dried up also, for the same reason, and he raised nothing. He met with the same experience in 1896. Subsequent to that time he never put in any crop. He says, "I had lost three crops, and I got disgusted with it; it was no use to try it, until I got the water right."

Transcript, pages 283-287.

His complaint in intervention was filed September 5, 1903.

Transcript, page 69.

He suffered for want of water even in 1893. On cross-examination he says, "They (the defendants) used water late in the fall of 1893; we run short of water then; I know that, in '93 I saw we were not going to have water enough to cut the oats and I cut it for hay; I would have had to irrigate it again to make oats and we didn't have the water to do it with."

Transcript, page 300.

The witness Godfrey, called by complainant and intervenor, testified that there has not been enough water at the place of either of those parties with which to irrigate since 1893.

Transcript, page 317.

Another witness called by the same parties, Mr. English, tells that he was at the Howell ranch in the fall of 1893 and that everything was dried up,—no water there,—there was a little at Morris's but not much.

Transcript, page 333.

The intervenor, Howell, called on behalf of the complainant, says the latter has not raised any crops for five or six years, because he has had no water, and that he has been unable to raise any grain since 1894 for want of water; that since 1895 the water begins to fail about June 1, and by July 1 he is out of water for irrigation, and by August even for stock.

Transcript, page 298.

The complainant himself says that he has been short of water by reason of its having been taken by defendants ever since 1894.

Transcript, page 267.

On behalf of the defendants, the witness Hine tells that the head-gate of the Howell ditch is covered up with dirt

in the creek bank, filled to the top. He says "I observed Mr. Howell's land as to showing evidence of cultivation; it showed nothing more than just where the laterals—the laterals are ploughed out, and outside of that there is no evidence of any cultivation being there. The laterals do not show evidence of carrying water at any time. They seem to be just the same as when they were made; the appearance of the land is similar to that above the place, the same as outside of the fence. There isn't any of it that has got any grass on it, or anything to show that anything has been raised on it."

Transcript, page 404.

It doesn't show that it has ever been irrigated; there is no grass or anything to show it has been irrigated.

Transcript, page 416.

The defendant Bean says of the place, "I visited Mr. Howell's place, he has something like 100 acres under ditch; I couldn't tell that it had ever been cultivated. I didn't see anything to indicate that a crop had ever been sown on it only there was some furrows ploughed through but it didn't show that there had been any water in them, or had been any crop there; these furrows were some laterals ploughed through the field."

Transcript, page 442.

The defendant Corbett Bennett says "I went to Mr. Howell's place at this time. His head gate was made of two inch stuff completely covered over, and the opening next to the creek was two feet long by five and one-half inches deep. The opening on the ditch side was filled up with rubbish and stuff that had drifted in there and filled it in. We passed over Howell's land; so far as looking at the ground now is concerned, it shows no evidence

of ever having been cultivated, he had ditches leading on the land, they showed they had never been used since they were built. Howell had no dam at all in Sage Creek, two posts set on each side of the creek, and some boards put across, evident to back up the water, but they were gone, there had at one time been in, I should judge, a temporary dam."

Transcript, pages 459-460.

ESTOPPEL.

In connection with the foregoing facts should be considered the undisputed testimony that the lands of all the parties are unproductive, and well night valueless without irrigation; that each of the appealing defendants has taken out ditches from either Sage Creek or Piney Creek, and completed their appropriations according to the laws of the State of Montana, that of Bean dating from July 1, 1893,

Transcript, page 523,

Bainbridge's from August, 1900,

Transcript, pages 504-508, 510, 513, 503,

Bert Bent and Wallace Bent from some time in the month of October, 1892, after the 20th.

Transcript, pages 356, 184, 534, 538-540, 549-556,

and Corbett Bennett from July 3, 1893,

Transcript pages 543-552, 528; 227-233;

that Bean irrigates 60 acres of alfalfa, timothy, grain, potatoes, garden and orchard on his place, the orchard consisting of five acres of apples, pear and plum trees.

Transcript, pages 517, 527;

and that he has on the place other improvements consisting of ditches, fences, corrals, barns and houses of

the value of $2000,

Transcript, page 517, 527,

that Bainbridge cultivates 30 acres of alfalfa, grain and potatoes, and has improvements on his place, consisting of a house, barns and sheep and horse corrals worth $1500,

Transcript, pages 514-515, 502;

that Bert Bent has 150 acres in crop mostly wild hay with some alfalfa and grain; that he has on his place improvements consisting of fence, corrals, sheep sheds, stables, etc., of the value of $2500,

Transcript pages 536-537, 571-574;

that Wallace Bent has 110 acres in crop, timothy, alfalfa, wild grass, grain and potatoes; that he has on his place improvements similar to his brother's worth $2000,

Transcript, page 535, 536, 556,

and that Corbett Bennett irrigates 30 acres of timothy and alfalfa and has similar improvements on his place worth $2000.

Transcript, page 530.

SINKING OF WATER IN SAGE CREEK.

A large amount of testimony was submitted on the one side to establish, and the other to refute the contention that in the season of low water the amount of the flow of Sage Creek is so small as that if allowed to run it would sink in the sands and be unavailable to the complainant or intervenor at their respective places

It appears by the uncontradicted evidence that Sage Creek is a slow stream, very crooked, the bed of which consists of sand or gravel, and that it is about forty miles, following its sinuous course, from the vicinity of the lands of the appellants to those of complainant.

Transcript, page 406, 455,

and twelve miles more to Howell's.

Transcript, page 438.

Robert Godfrey, who was called on behalf of complainant, testified that even in the year 1892 (it will be remembered that the reservation was not opened until October of that year and that none of the defendants diverted any water until after that time) there were simply puddles of water in the creek at complainant's place, and that the creek was dry at that of the intervenor by July 1st.

Transcript, page 324.

Michael Wrote, though one of the defendants, called by complainant, testified that the water sinks in the bed of Sage Creek in various places, and particularly at a place about two miles below the mouth of Piney Creek. This witness showed long acquaintance and familiarity with Sage Creek. He saw it every year and every month in the year since 1892. He had noticed it before that time at least in the seasons of 1887 and 1890. He found the same condition to prevail at the Morris place in 1887, water standing in holes. He camped on the creek with a cow outfit in 1890 and was obliged to search a place above Morris's because there was not water enough in Sage Creek to water the saddle horses or even to cook with except such as stood in the holes. Even then there was more than there was in 1887.

Transcript, pages 350-352.

Wallace Bent, one of the defendants, also called by complainant, testified to having lived on the creek since 1893. He said that he had seen all the water in the stream turned out and running down its channel and that he

never knew it to reach the Morris place.

Transcript, pages 362-363.

Albert H. Martin, a witness who is not a party and who appears to be entirely disinterested, tells that he worked as a cowboy in the vicinity of Sage Creek from 1887 to 1893; he details an experience he had in the year 1889; he was gathering beeves and crossed Sage Creek with them some time in August or September of that year; they crossed with the wagon right at the Morris place, but there wasn't water enough there with which to water the cattle and they drove them up to about the mouth of Piney, where the cattle crossed; there was scarcely any water at all where the wagon crossed, and it was very scarce from there on up to the mouth of Piney, where there was considerable.

Transcript, page 384-387.

Frank Medhurst testified that he lived on the Morris place from the spring of '84 to July, '85. When he left, July 6, 1885, he was able to get 10 or 15 inches of water out of the creek, not more than enough to irrigate a few acres. That was not yet the season of the lowest water and water was still scarcer in the creek the preceding year. He had seen the creek also in 1883, when the flow was no greater. He tells that the bed of the creek above the Morris place is gravel and quicksand, and that in those places the water sinks and does not rise again. He says further that the water begins to fall about June 20th, but before that time the flow suffices to irrigate 100 acres.

Transcript, page 392-399.

The appellant J. N. Bean testifies that at different times in the summer of 1903 all the water in the creek was allowed to flow down its bed; that it flowed about a

mile and a half below his place, and there disappeared, leaving the creek dry; that in the spring of the year when the freshets are on there is plenty of water for everybody, but that after June 20th or thereabouts, no water flows below the mouth of Piney ,but that above a small quantity, possibly 40 inches, continues to flow. Between Bent's place and Morris's the bed of the creek is gravel, quicksand and rocks in which the water sinks. Pryor Mountain is the catchment basin supplying Sage Creek. It was formerly heavily wooded, but has been denuded in recent years in consequence of which the supply of water furnished by it goes away with a rush and becomes exhausted more early in the season than heretofore.

Transcript, page 433-436.

Corbett Bennett, another defendant, also testifies that in the fall of 1892, before any water was being taken out above, he saw the creek at the Morris place, where there was not water enough to permit irrigation. This witness testifies to having crossed Piney Creek many times before any of its waters were taken out for irrigation and says that in the dry season only a very little stream reached Sage Creek from it; that there was hardly more flowing in it than enough to water a horse; that below the mouth of Piney, Sage Creek is a very sluggish stream and that quicksands that imprison the waters abound.

Transcript, page 452-457.

S. W. Bent testifies that it is eighteen miles in a straight line from his place to Morris' and more than twice that distance following Sage Creek; that intervening it is boggy, marshy,—and that, as may be imagined from that fact, the stream is sluggish, flowing over quick-

sands in places; and that if all the water in Sage and Piney Creeks was allowed to flow down it would not reach the Morris place, the total amount in Sage Creek in the dry season not exceeding 300 inches.

Transcript, pages 475, 485.

Wallace Bent and William Bainbridge gave testimony to the same effect as the other appellants on the characteristics of the creek.

Transcript, pages 486-490, 492; 497-499.

In rebuttal of this testimony the witnesses Lampman, Sarver, Norton and James F. and Joseph M. Howell denied that there are any quicksands in Sage Creek or that the water sinks in it.

Transcript, pages 193, 204, 195, 206, 197, 208-209, 199, 210, 218-219.

In support of the complainant's right he offered in evidence a statement with endorsements as follows:

"Plaintiff's Exhibit 'A.'

"In the District Court, Second Judicial District, in and for Johnson County, Wyoming Territory.

Statement of Claim to Water Right.

Under Chapter 61, Session Laws of 1886, Irrigation, "An act to Regulate the use of Water for Irrigation and for other purposes, and providing for Priority of Rights Thereto."

By William A. Morris, of the County of Johnson.

Territory of Wyoming.

Owner of the Sage Creek Water Right.

Territory of Montana,

County of Yellowstone,—ss.

William A. Morris, being first duly sworn, according to law, do depose and say that he is a resident of and is

located in Johnson County, Wyoming Territory, and he makes his statement of claim to Water Right for the purpose of securing the right to the water of Sage Creek in the said County and Territory heretofore appropriated by him, and for said purpose I do depose and say: The name of said claimant for which said appropriation is claimed is William A. Morris. The name of the owner of said ditch is William A. Morris. The post office address of the owner of said ditch Billings, Montana. The headgate of said ditch and water right is located on Sage Creek in Johnson County, Wyoming, about one mile down said creek from where said creek crosses the Wyoming and Montana line. The general course of said ditch is from about northeast to southeast. The name of the natural stream from which the said ditch draws its supply of water is Sage Creek, a tributary of Stinkwater River, Wyoming. The length of said ditch is three miles. The width of said ditch is (3 1-2) three and 1-2 feet. The depth of said ditch is two and 1-2 feet. The grade of said ditch is 50 feet per mile. The water of said stream was appropriated by William A. Morris, aforesaid, by means of a dam in said creek and ditch therefrom for said Willam A. Morris by the original construction thereof on the 5th day of May, A. D. 1887.

The amount of water claimed for said ditch is —— cubic feet per second of time.

The present capacity of said ditch is —— cubic feet per second of time.

The number of acres of land under said ditch and being and proposed to be irrigated therefrom is six hundred and forty acres, more or less.

W. A. Morris.

Subscribed and sworn to in my presence this 25th day of June, A. D. 1887. John McGinness,
(Notarial Seal.) Notary Public.

(Endorsed): Wm. A. Morris. No. 2804. Office of Register of Deeds. County of Johnson.

I hereby certify that the within instrument was filed in this office for record on the 2 day of July, A. D. 1887, at 5 o'clock P. M. and was duly recorded in Book "D," Misc. Rec., page 405. W. A. Evans, Register of Deeds. ....., Deputy. 28-04, Fees pd. 53. No. 666. Morris. Plaintiff's Exhibit "A" to be attached to the deposition of Wm. A. Morris. Filed Aug. 10, 1905. Geo. W. Sproule, Clerk."

Transcript, pages 276 to 278.

No evidence of the filing was offered except the endorsement on the statement.

To the introduction of this statement the answering defendants objected on the ground that the same is immaterial and incompetent and does not comply with the laws of either Wyoming or Montana.

Transcript, page 262.

The intervenor introduced as his notices of appropriation two papers as follows:

"Plaintiff's Exhibit 'B.'

"Timber Culture Ditch.

Taken out of Sage Creek a tributary of Stinking Waer River, on or near SW 1-4 of the SW 1-4 of Sec. 18, T. 57 N., R. 97 W., running thence 24 degrees E. of S. 88 rods, thence 30 degrees E. of S. 32 R. thence 9 degrees S. of E. 22 R. 4 links, thence 42 degrees E. of S. 24 R. 10 links, thence 12 degrees E. of S., 8 R. thence 12 degrees E. of S. 8 R., thence 12 degrees N. of W. 16 R., thence

45 degrees S. of W. 64 R., thence 25 degrees E. of S. 120 R., thence 31 1-2 degrees E. of S. 147 R. 4 links to the north line of Sec. 30, T. 57 N., R. 97 west. Water was first run through said ditch on August the 4th, 1891.

(Morris vs. Bean et al. Plaintiff's Exhibit 'B,' H. L. W.)"

"Plaintiff's Exhibit B-2.

The State of Wyoming,
Fremont County.—ss.

This certifies that Josiah Cook, Esq., was a duly elected and fully qualified justice of the peace in and for said county in said state, from the first Monday in January, 1891, to the first Monday in Jany., 1893, that all official acts done by him within said dates is entitled in full faith and credence.

In witness whereof, I have hereunto set my official signature, attested by my official seal, the seal of said county this Nov. 15th, 1893. J. A. McAvoy.
County Clerk and the proper certifying officer under the laws of Wyoming to the official capacity of Notaries and Justices of the Peace.

(SEAL) J. A. McAVOY,
County Clerk.

(Plaintiff's Exhibit B-2, H. L. W.)"

"Plaintiff's Exhibit B-3.

Statement of Claim to Water Right.

By T. N. Howell, Owner of the Timber Culture Ditch.
Territory of Wyoming.
County of Fremont,—ss.

I, T. N. Howell, being first duly sworn, do depose and say that I am the owner of the above-named ditch, situated in Water District No. 8, Fremont County, Wy-

oming Territory, and I make this statement for the purpose of securing the right to the water of Sage Creek heretofore appropriated by me and the right of way for said ditch on the line shown by the accompanying———

1.—The name of said ditch is Timber Culture.

2.—The name of the owner of said ditch is T. N. Howell.

3. The postoffice address of the owner of said ditch is Lovell, Wyoming.

4. The headgate of said ditch is located on the SW 1-4 of the SW 1-4 of Sec. 18, T. 57 N., R. 97 W.

5. The general course of said ditch is SE. and the line of said ditch is more particularly shown by the accompanying ———.

6. The name of the natural stream from which said ditch draws its supply of water is Sage Creek, a tributary of Stinking Water River.

7. The length of said ditch is one and one-half miles.

8. The width of said ditch is 8 feet at the top and six feet at the bottom.

9. The depth of said ditch is one foot.

10. The grade of said ditch is one-fourth inch to the rod.

11. The carrying capacity of said ditch is ——— cubic feet per second of time.

12. Work was commenced on said ditch August 1st, 1890.

13. Water was appropriated from said ditch for NE. 1-4 of the SE. 1-4 and the SE. 1-4 of the NE. 1-4, and W. 1-2 of the NE. 1-4, S. 30, T. 57 N., R. 97 W.

14. The number of acres of land lying under and being and proposed to be irrigated by water therefrom is 160

acres.

T. N. HOWELL.

Sworn to and subscribed before me this 7th day of Sep., 1891.

JOSIAH COOK,
Justice of the Peace.

(Plaintiff's Exhibit "B-3." H. L. W.)

(Endorsed): Stat. Claim to W. Right by T. N. Howell, taking water from Sage Creek, a tributary of Stinking Water River.

State of Wyoming,

Fremont Co. Clerk's Office,—No. 5184.

Filed in this office for record at 10 o'clock A. M. Oct. 28, 1891, and recorded in Book A. of W. R. in the office of the State Engineer at pages 130 and 131, Miscellaneous Records.

J. A. McAVOY,
County Clerk and Reg. Deeds,

Recorded by State Engineer for Clk. Fremont Co. Wyo. Fees paid.

(Plaintiff's Exhibit "B" to Deposition of T. N. Howell.)"

Transcript, pages 303 to 307.

It seems to have been conceded below that neither the one nor the other of these statements met the requirements of the law of Wyoming at the time the appropriations of those parties respectively were made.

II.

SPECIFICATION OF ERRORS.

I.

It was error in the Court to find or rule that any ap-

propriation made by the complainant or the intervenor of the waters of a stream in the State of Wyoming gave to them, or either of them, any priority over any right acquired by these appealing defendants or any of the defendants, under or by virtue of the laws of the State of Montana, or to the waters of any stream within the State of Montana.

II.

It was error in the Court to find or rule that any appropriation made by the complainant or the intervenor of any water within the State of Wyoming, or made under the laws of Wyoming, or any right to the use of the water of any stream in the said State of Wyoming, or acquired under the laws of Wyoming, or any right to the use of the water of any stream in the said State of Wyoming, or acquired under its laws, furnished any basis before any court sitting in the State of Montana for an injunction against these appealing defendants, having appropriated and acquired the right to the use of the waters being used by them within the State of Montana, under and by virtue of the laws of the State of Montana.

III.

It was error in the Court to find or rule that the Court had any jurisdiction to enforce, as against citizens of the State of Montana using waters within the State of Montana, of streams within the State of Montana, appropriated under its laws, rights claimed to have been acquired by the complainant and the intervenor to the use in the State of Wyoming of the waters of a stream within the State of Wyoming, acquired under and by virtue of the laws of the State of Wyoming.

IV.

It was error in the Court not to dismiss the petition of the intervenor, and it was error to grant him any relief, for that it appears that the Court has no jurisdiction of the subject matter of his petition or to grant him any relief, because he has not shown that he is or was at any time a citizen of any state other than the State of Montana, of which the defendants against whom he seeks and was granted relief are citizens.

V.

It was error to grant any relief to the complainant, for that the complainant consenting to the intervenor's joining with him in the prosecution of this suit against the defendants, the intervenor appearing to be a citizen of the same state with defendants, the Court lost jurisdiction and had no power to enter any decree except one of dismissal.

VI.

It was error in the Court to find or rule that any acts of the complainant or the intervenor in the State of Wyoming, while the lands now owned by these appealing defendants were a part of the Crow Indian Reservation, gave to the said complainant or the intervenor any priority of right to the waters of Sage Creek as against the rights of the Indians to the waters of the streams within the said reservation, or as against any person acquiring any of said lands through which any streams of the said reservation might flow, and particularly as against these appealing defendants acquiring lands within what was the said Crow Indian Reservation, at the time of the alleged appropriations of the said complainant and the said intervenor, on the opening of said reserfation,

through which flowed the streams, from making use of the waters of which the decree entered herein enjoins these appealing defendants.

VII.

It was error in the Court to hold that any acts of the complainant or the intervenor, towards the appropriations of the waters of any stream in the State of Wyoming gave to them any rights as against occupants of lands within what was formerly the Crow Indian Reservation, as to streams flowing through the same, antedating the time when such lands ceased to be a part of said Crow Indian Reservation.

VIII.

It was error in the Court to find that the cause of action of either the complainant or the intervenor is not barred by the Statute of Limitations.

IX.

It was error in the Court to find that either the complainant or the intervenor is not guilty of such laches as to defeat his right to maintain this action.

X.

It was error in the Court to find that either the complainant or the intervenor is not estopped from maintaining this action.

XI.

It was error in the Court to find that either the complainant or the intervenor has not abandoned any right he ever acquired as against these appealing defendants to the waters of Sage Creek.

XII.

It was error in the Court to find or rule that the waters of said Creek, during the irrigating season do not sink

in the channel thereof, above the land of either the complainant or the intervenor, or that a useful quantity of the same would reach the lands of the intervenor or the complainant during the irrigating season, but for the diversion of the same and its tributaries by the defendant, and to fail to find and rule that the waters of said Creek, during the irrigating season, sink in its bed or channel, so that, though the defendants diverted none of the same or the waters of the tributaries of the said Sage Creek, a useful quantity thereof would not reach the lands of either the complainant or the intervenor.

XIII.

It was error in the Court to find that the complainant is entitled to, or to adjudge to him, more than twenty-five inches, miners' measurement, of water, or to find that the intervenor is entitled to, or to adjudge to him, more than forty inches, miner's measurement, of water.

XIV.

It was error in the court to award to either complainant or intervenor any number of inches, "miner's measurement," for that in his bill complainant alleges an appropriation of two hundred and fifty inches "statutory measurement" and intervenor six and one-fourth cubic feet per second, neither alleging an appropriation of any number of inches "miner's measurement."

XV.

It was error in the Court to award to either the complainant or the intervenor any quantity of water measured by miner's inches, for that the standard for the measurement of water in the State of Wyoming is a cubic foot of water per second, and because a miner's inch is an uncertain and indeterminate quantity.

XVI.

It was error in the Court to hold that the complainant acquired a water right, notwithstanding he failed to comply with the laws of Wyoming in reference to filing of a statement of his appropriation, as required by the laws of that State.

XVII.

It was error in the Court to hold that the intervenor acquired a water right, notwithstanding he failed to comply with the laws of Wyoming by filing an application, and obtaining a permit, as required by Section 34 of the Act of the Legislative Assembly of the State of Wyoming, approved December 22nd, 1890.

XVIII.

It was error in the Court to hold it unnecessary for complainant or intervenor to make proof that their appropriations, respectively, were made either on the public domain or on private lands, with the consent of the owner of such lands.

XIX.

It was error in the court to hold that the amount in controversy exceeded $2,000.00.

III.

ARGUMENT.

I.

A question of first importance in this case is as to whether the complainant or the intervenor has any water right that he can assert in any court in Montana, seeing that the only right he claims originates by reason of his diversion in the State of Wyoming of the waters of a stream coming into that state from the State of Mon

tana, within which state the defendants are making the diversions complained of from the same stream and its tributaries.

Complainant and intervenor claim to be citizens of Wyoming. Defendants against whom the decree appealed from is awarded are citizens of Montana.

It is with some diffidence that the discussion of this important question is entered into, in view of the fact that the conclusion arrived at by the learned trial judge that a water right acquired in one state by a citizen thereof, for use on lands in that state, may be enforced in another against citizens of that state, is supported by the conclusion of Judge Knowles in

Howell vs. Johnson, 89 Fed. 556;

and in Morris vs. Bean, 123 Fed. 618;

by that of Judge Hallett in

Hoge vs. Eaton, 135 Fed. 411;

by that of Judge Morrow in

Anderson vs. Bassman, 140 Fed. 14,

and by the reasoning (the question presented not being identical) of the Supreme Court of Wyoming, in

Willey vs. Decker, 73 Pac. 210.

We are to some extent, however, reassured by the fact that the course of reasoning of the learned federal judges, including Judge Whitson, on whose order the decree appealed from was entered, has been repudiated by the Supreme Court of Wyoming, and the theory of the nature and origin of the right of appropriation upon which the decisions of the federal courts referred to are founded, held by that learned court to be altogether erroneous.

It might be said in passing that the ruling of Judge

Knowles, reported under the title of Howell vs. Johnson, 89 Fed. 556, was made on a demurrer in that case, and his later ruling in Morris vs. Bean. 123 Fed. 618, on an application for a temporary injunction. His views were accepted by Judge Morrow in Anderson vs. Bassman and Judge Hallett hardly more than expresses his conviction as to the question involved in Hoge vs. Eaton. Though Judge Whitson gives us the benefit of some discussion of the subject in his opinion on which the decree is based,

Morris vs. Bean, 146 Fed. 423,

it is evident that the earlier rulings of Judge Knowles had a preponderating influence with him, as they, of right should have, not only because they, in a sense, declared the law of the case, but because of the just fame of that learned jurist in respect particularly to those branches of the law involved in the case.

But the Supreme Court of Wyoming having expressly repudiated the theory upon which Judge Knowles reached his conclusions, arrives at the same result by a course of reasoning not at all clear.

Some attention should first be given to these two conflicting theories of water rights.

In Howell vs. Johnson, Judge Knowles said:

> "It is urged that in some way the state of Montana has some right in these waters in Sage Creek or some control over the same. It never purchased them. It never owned them. * * * In that case (St. Anthony Falls Water-Power Co. v. Board of Water Com'rs of St. Paul, 18 Sup. Ct. 157) it was not held, nor was it held in any of the cases cited in the decision therein, that the rights of the owner of the land

through which any navigable stream flowed, within the boundaries of any state, depended upon the laws of such state, or that the said owners' right to such waters depended upon such laws, as against one who claimed a right to the same under the laws of congress. To so hold would uphold the view that a state might interfere with the primary disposal of the land of the national government. When a party has obtained title to property from the national government, the state government has no right to destroy that title, except under the power of eminent domain. The state of Montana cannot step in, and say, 'The right to the water of Sage creek, which the plaintiff acquired under the laws of congress, you cannot exercise in this state.'"

Howell vs. Johnson, 89 Fed. 559.

The theory so advanced by the defendants was held to be groundless, at least as to non-navigable waters. Earlier in the opinion the learned judge had traced the foundation of water rights to congressional legislation, to a grant from the general government, not from the state government, his course of reasoning being shown by the following extract from the opinion.

"The national government is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of these lands, it has the power to sell or dispose of any estate therein or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, sep-

arate from the rest of the estate, under such conditions as may seem to it proper."

Howell vs. Johnson, 89 Fed. 558.

The idea is quite clearly expressed by Judge Morrow in Anderson vs. Bassman, wherein, after referring at length to the views of Judge Knowles in Morris vs. Bean, he says :

"It was further urged that, as the complainant had obtained his rights from the state of Wyoming by appropriating the water in accordance with its laws, his rights depended upon such laws, and were governed thereby. But the court very clearly explained that the rights of the complainant did not rest upon the laws of Wyoming, but upon the laws of Congress; that the legislative enactment of Wyoming was only a condition which brought the law of Congress into force."

Anderson vs. Bassman, 140 Fed. 41.

Now the state of Wyoming denies that the right to the use of the waters of that state by appropriation rests upon any congressional grant; it denies that the waters of that state belonged to the general government except as trustee for the state, and it asserts that the state and the state alone is the fountain and source from which springs any right whatever to the use of the flowing streams within its borders.

Its views are elaborated in a number of decisions of its highest judicial tribunal and are enforced with a wealth of learning and cogency of reasoning that would command respect, even though the appellees were not citizens of that state, and required to look to it for such rights as they may have to the waters of Sage Creek.

The opinion in the case of

Farm Investment Co. vs. Carpenter, 61 Pac. 258,

sets forth most fully, perhaps, the theory of the Wyoming court. Therein reference is made to the following provisions of the constitution of that state:

> " 'Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved.' Article 1, Sec. 31. 'The waters of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.' Article 8, Sec. 1. 'There shall be constituted a board of control to be composed of the state engineer, and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state.' Id. Sec. 2. 'Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.' Id. Sec. 3. 'The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof.' Id. Sec. 4. 'There shall be a state engineer who shall be appointed by the governor of the state and confirmed by the senate; he shall hold

his office for the term of six (6) years, or until his successor shall have been appointed and shall have qualified. He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position.' Id. Sec. 5."

The provision that "The waters of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state are hereby declared to be the property of the state" is held to be merely declaratory of an existing right, as of necessity it must be. If these waters did not belong to the state, but were owned by the general government or by private individuals the recital in the Wyoming constitution would be an evident attempt at confiscation.

The court, accordingly, defends this declaration in the following language:

"At the outset, however, it is strenuously insisted that the declaration contained in the constitution, that the waters of the natural streams, etc., are the property of the state, is meaningless and of no force and effect. It is argued that the state no more than an individual can acquire property by a mere assertion of ownership, and that the United States, as the primary owner of the soil, is also primarily possessed of title to the waters of the streams flowing across the public lands. This contention demands more than a passing notice. * * * Under the doctrine of prior appropriation, it would seem essential that

the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such waters are, we think, generally regarded as public in character. By the civil law the waters of all natural streams were publici juris, and, according to Bracton, that was the rule anciently in England. Kin. Irr. Sec. 53; Gould, Waters, Sec. 6. At the modern common law, public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws, and sanctioned by the courts,—a public use sufficient to support the exercise of the power of eminent domain. Irrigation Dist. v. Bradley, 164 U. S. 112, 160, 17 Sup. Ct. 56, 41 L. Ed. 369. This use and the doctrine supporting it are founded upon the necessities growing out of natural conditions, and are absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region, and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water. The common-law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws, and decisions of courts, and

the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become, perforce, publici juris. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. In a country where doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to appropriation are public, or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however, this may be, we entertain no doubt of the power of the people in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams and other natural bodies of water to be the property of the public or of the state. Nor do we doubt that the legislature may make a like declaration, when in that particular unrestrained by the constitution. If any consent of the general government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in several enactments by congress, beginning with the act of July 26, 1866, and including the desert-land act of March 3, 1877."

It invites attention to a similar legislative declaration in Arizona and Nevada and to the fact that the people of Colorado made a similar assertion through their constitution in reference to which the supreme court of that state said in

Wheeler vs. Irrigation Co., 10 Col. 582, 17 Pac. 487:

"Our constitution dedicates all unappropriated water in the natural streams of the state to the use of the people, the ownership thereof being vested in the public. We shall presently see that after appropriation the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral remains in the general-public, while the paramount right to its use, unless forfeited, continues in the appropriator."

And in

Ft. Morgan L. & C. Co. vs. South Platte Co., 18 Col. 1, 30 Pac. 1032.

"Under our constitution, the water of every natural stream in this state is deemed to be the property of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom and apply the same to beneficial uses is, however, expressly guaranteed. By such diversion and use a priority of right to the use of the water may be acquired."

Reference is then made to the well-known decisions of the Supreme Court of the United States holding that the tide waters and the waters of navigable streams are the property of the state, a proposition assented to by Judge Knowles in Howell vs. Johnson, and the conclusion is reached that in the arid states where water, in the language of the Wyoming constitution, is "essential to industrial prosperity", the proprietorship of all waters is in "the state, as representative of the public or people."

A similar declaration as to the state's ownership of the waters within it is made in the constitution of North Dakota.

North Dakota Const., Art. 17, Sec. 210.

A most instructive consideration of this subject and the conflicting opinions of courts touching it will be found in

1 Farnham on Waters, 135 to 136a.

and in

2 Farnham on Waters, 649 to 652.

Results widely different and of great moment follow from the adoption of the one or the other theory of the origin of water rights,—whether they emanate from the state or exist by reason of a grant from the general government.

If the general government owns the waters on the public domain as an incident of its ownership of the public landsas asserted by Judge Knowles in Howell vs. Johnson, it may grant the right to the water separate and apart from the land. It is argued from the premise of its ownership of the waters that the acts of 1866 and 1890 operate to convey to an appropriator title to so much of the waters of a stream as he may appropriate, but that if the government has theretofore granted to any one land bordering on or traversed by the stream, it has already granted to such person as an incident to his grant of land riparian rights in the stream, to which the right of the subsequent appropriator is subject. If the grant of the riparian lands, by relation or otherwise, antedates the appropriation, the riparian right is paramount; if it is later, by the provisions of the acts of 1870 and 1866, it is subject to the accrued right to the water.

The views expressed by the learned judge in reference to the proprietorship of the general government in the waters on the public domain led him in

Cruse vs. McCauley, 96 Fed. 369,

to the conclusion that a pre-emptor whose declaratory statement was filed prior to an appropriation of the waters of a stream flowing through his pre-emption claim, could assert riparian rights as against the appropriator.

This is the doctrine of

Lux vs. Haggin, 69 Cal. 255; 10 Pac. 674.

in which the rule of the civil law, adverted to in Farm Investment Company vs. Carpenter, that the title to all waters is in the public, was held not to be in force in California.

See note 10 to

1 Farnham on Waters, 136.

Oregon followed the California rule in

Curtis vs. Water Co., 20 Or. 34.

It is likewise the law of Washington.

Benton vs. Johncox, 17 Wash. 277; 49 Pac. 495.

It is asserted in recent exhaustive discussions of the subject by the supreme court of Nebraska.

Meng vs. Coffey, 93 N W. 713;

Crawford Co. vs. Hathaway, 93 N. W. 781.

It must be the law of North Dakota in view of the decision in

Bigelow vs. Draper, 69 N. W. 570.

It will be observed, however, that all the states from which these decisions come, those of Judge Knowles alone excepted, lie about the border of the arid region. To what extent the opinions of Judges Morrow and Whitson may have been influenced by the doctrine prevailing in their own states, it is, of course, impossible to know.

But when we get into the very heart of the arid region, we find the state courts uniformly refusing to give any

assent to the existence of any riparian right whatever. They deny that the grantee of *land* from the government acquired any right whatever in the water flowing through it. Colorado led in the denial to the riparian owner of any rights in the waters of the stream,

Coffin vs. Left Hand Ditch Co., 6 Col. 443,

and the rule announced by it became known as the "Colorado doctrine"

Long on Irrigation 6.

in distinction from the rule of

Lux vs. Haggin,

spoken of as the "California doctrine."

Willey vs. Decker, 73 Pac. 210-214.

Although Nevada originally enforced the riparian right, it no longer recognizes it.

Union M. & M. Co. vs. Cangberg, 81 Fed. 73-94.

Arizona enforced the civil law that waters were public and subject to disposition by the legislature under the law of appropriation, in

Clough vs. Wing, 17 Pac. 453.

The supreme court of Idaho spoke of the "phantom of riparian rights" and denied the existence of such a thing in that state.

Drake vs. Earhart, 23 Pac. 541.

Utah declines to recognize their existence.

Stowell vs. Johnson, 26 Pac. 290.

New Mexico adheres to the same view.

Albuquerque vs. Gutierrez, 61 Pac. 357.

And Montana gave its assent to these decisions in

Montgomery vs. Fitzpatrick, 29 Mont. 181-185,

in the opinion in which the court said:

"In all of the states of the union where mining has

been at all extensively engaged in, especially in the northwestern states and territories, the question here presented for determination has been a fruitful source of litigation. Under the common law the owner of land through or along which a stream flowed had a right to have it flow in its natural channel, undiminished substantially in quantity, and unpolluted in quality, whether he derived any practical benefit from such stream or not. This doctrine has been departed from, if indeed, it ever was recognized as the rule of law in the gold mining states and territories of the northwestern part of the union, and especially so in the Pacific states and territories. There the right to appropriate water for mining and other useful purposes is as old as the settlement and civilization of such states and territories. The right to appropriate water on the public lands by miners and for other useful purposes was long ago recognized by congress. We think it may be safely said that the right to appropriate water for mining and other useful purposes is settled as the law in all the mining states of the West. It is certainly the settled rule in this state. (Atchison v. Peterson, 1 Mont. 561; Gallagher v. Basey, 1 Mont. 457.) California, it is true, by a divided court has confined the right to make such appropriation to waters on public lands, holding that the purchaser of lands from the government takes the same with all the common-law riparian rights attached. (Lux v. Haggin, 49 Cal. 255. 10 Pac. 674.)

"The Oregon Supreme Court, in Curtis v. Water Co., 20 Or. 34, 23 Pac. 808, and 25 Pac. 378, followed

the rule announced by the California court. But this restriction is not recognized in Nevada or Colorado, nor in any other of the mining states or territories, that we are aware of. (Jones v. Adams, 19 Nev. 78, 6 Pac. 442; Reno Smelting, M. & R. Works v. Stevenson, 20 Nev. 269, 21 Pac. 317; Coffin v. Ditch Co., 6 Col. 443; Golden Canal Co. v. Bright, 8 Col. 144, 6 Pac. 142.)"

Some confusion in opinion as to the law of Montana on this subject has arisen by reason of some remarks made by Mr. Justice Pigott in

Smith vs. Denniff, 24 Mont. 20; 60 Pac. 398.

The supreme court of Wyoming appears to have gained the impression that by this decision the Montana court is committed to the "California doctrine."

Willey vs. Decker, 73 Pac. 210.

And the author of

Long on Irrigation

is similarly in error.

It is clear from the context that the only idea the court intended to convey by the language to which has been attributed this significance is that one may not invade the possession of a riparian proprietor for the purpose of cutting therein a ditch to effect a diversion of the water of a stream, and thus initiate an appropriation without the consent of the riparian proprietor; that both the general government and the state government have given permission to cut ditches through their lands either to initiate the right or to convey the water to the lands to be irrigated, but that permission must be first had of a private riparian proprietor.

None of the district courts of the State of Montana

ever enforce the riparian right and Farnham says it does not exist in the law of that state.

3 Farnham on Waters, 652d.

The learned author last referred to invites attention to the fact that the court in the very case of Smith vs. Denniff, supra, declared that by reason of a provision of the constitution, the State of Montana "has, by necessary implication, assumed to itself the ownership *sub modo* of the rivers and streams of the state."

The views of the supreme court of Wyoming have been adverted to. With one accord the states of the arid region deny that the grantee of land from the government gets any right to the waters flowing through or along it, and assert that such waters belong to and remain in the state; that the state has the right to say and does say whether those waters shall be enjoyed by the riparian proprietors in accordance with the rule of the common law, or be enjoyed by those who may divert and appropriate them. They declare that the water rights do not originate in grant from the general government by virtue of the act of 1866, but that that act merely, as has been repeatedly declared by the Supreme Court of the United States, recognized pre-existing rights

Forbes vs. Gracey, 94 U. S. 762;

Jennison vs. Kirk, 98 U. S. 453;

Broder vs. Water Co., 101 U. S. 274.

If it be true that the rights existed before there was any legislation whatever on the subject by Congress, in what did they originate? Clearly in the local law. But neither a state nor any subdivision of the state has any power to dispose of the public lands. That power is vested, by the express provisions of the constitution, in Congress.

The deduction is inevitable that if these rights were in existence prior to the time that Congress acted at all, they must have been derived from some authority other than Congress.

The act of 1866 was simply a formal renunciation on the part of the United States of any claim it or its grantees might have to the continued flow in the stream of water that had been appropriated, assuming that it or they had any such. It was, as disclosed by its very terms, a statute of repose, not of grant. Nor can we imagine, as seems to be intimated in Howell vs. Johnson, that by this statute power was delegated to the local legislatures to enact laws looking to the disposition of the waters of the streams on the public domain. If such waters are indeed incidents of the lands or the right to use such waters incident to the lands over which they flow, such a delegation of power to legislate on a subject confided by the constitution exclusively to Congress would be void.

A recent declaration by the Supreme Court of the United States leads clearly to the conclusion that the views so generally entertained as to the origin of water rights in grant from the government, expressed by the learned federal judges in the cases referred to, must be revised. Reference is made to the following from

U. S. vs. Rio Grande Irr. Co., 174 U. S. 690:

> "As to every stream within its dominion, a state may change this common-law rule, and permit the appropriation of the flowing waters for such purposes as it deems wise."

If a state can do this, it must be because it owns the waters and simply permits their use obedient to its laws.

If it may take away riparian rights as understood at the common law and give the use of the water to appropriators, it may, when that course seems to it wise, abolish the system of appropriation and invest riparian owners with such rights in the stream as they would enjoy at the common law. If we hold to the theory that the appropriator of water enjoys a grant from the general government, it would be simply confiscation to take it away from him and distribute it among riparian proprietors; and equally, if the riparian proprietor enjoys riparian rights in the stream as an incident of his grant of lands from the government, the legislature is powerless to take that property away from him.

Judge Hallett says in

Mohl vs. Lamar Canal Co., 128 Fed. 776-779,

that an appropriator of water enjoys a mere license or privilege to take the water and "has no contract with or grant from the government, federal or state, in respect to his privilege."

Entertaining, as we have heretofore shown, the theory that the riparian right accrues, as against all subsequent appropriators, in favor of the riparian grantee of the government, it has been held in North Dakota that an act abolishing riparian rights is void as to accrued rights.

Bigelow vs. Draper, 69 N. W. 573.

As all lands in a state, save its own, are held either in private ownership or belong to the government, and the government as a proprietor enjoys exactly the same rights as any other owner, it follows that the state can not abolish the riparian right, according to the reasoning of these decisions, except as to its own lands. Of course, the Supreme Court of the United States contemplated

and expressed its view of the validity of legislation of a much more sweeping character.

Rights which one enjoys by reason of his ownership and interest in property, under the laws existing at the time of the acquisition of that interest, cannot (subject, of course, to the police power of the state) be taken away from him by subsequent repeal or amendment of the law, by virtue of which he enjoys such rights.

B. & B. Co. vs. M. O. P. Co., 25 Mont. 41.

It is respectfully urged, accordingly, that, in view of this late declaration of the Federal Supreme Court, and the views repeatedly expressed concerning the act of 1866, the theory advanced by the Supreme Courts of Colorado, Wyoming and Montana, and concurred in by the Courts of last resort in the other interior States in the arid region, that the waters within their borders belong to the public, to the state, is correct, and must ultimately be adopted.

It is said, in some of the decisions referred to, that the common law, as it defines the rights of riparian proprietors, is inapplicable to the conditions existing in regions where irrigation is necessary, and therefore that the riparian right does not exist. But if the riparian proprietor does not own the water or the right to use it, who does? There can be but one answer. It belongs to the public, to the state.

That the state owns the navigable waters within its borders and the soil under them is not open to question.

Shively vs. Bowlby, 152 U. S. 1.

On acquiring new territory, the general government becomes invested with the title to such waters and lands, but holds them, not as it holds the general body of the

public domain, subject to disposition for the benefit of the general treasury, but in trust for the people of the state or states, which may ultimately be formed out of the new territory, which state or states, on being admitted, have the absolute right of disposition of such lands and waters,

Id. pages 48 and 49,

without any permission from Congress.

And why has the state the title to navigable waters and the soil under them? Plainly because such waters are devoted to a public use as public highways. It is not necessary to go beyond Shively vs. Bowlby, to find an answer to this question.

Now, in the arid regions, irrigation is a public use of importance no less than is navigation in the more humid sections. The great empires now arising in majesty out of the heart of the American Desert, could never have been heard of, as their courts have declared, were it not that their waters have been held devoted to this great public use. The Supreme Court of the United States did not hesitate to say in

Fallbrooke Irrig. Dist. vs. Bradley, 164 U. S. 112-164.

"We have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use." It is declared to be such by the constitution and statutes of nearly every western state.

Now if the state owns the navigable waters within its its borders, because they are devoted to a public use, why does it not equally own the non-navigable waters in those states where they are, and since civilization had its feeble beginnings within their territory, have been de-

voted to a public use?

A recent able opinion of the Court of Chancery of the State of New Jersey takes the position that the state owns all the waters within it, and supports its views by a learned and well reasoned opinion.

McCarter vs. Hudson County Water Co., 65 Atl. 489.

If the State of New Jersey enjoys such a proprietary right in the waters within its boundaries, so must each western state, or it would not have been admitted to the Union on an equality with the original states. It was upon this consideration that, notwithstanding its general proprietorship of the lands in the newly acquired western territory, it was held the general government did not become the owner of lands under tidal and navigable waters, and a patent from it to such lands would be void.

It is alone upon this theory that the legislation of the western states, prescribing the manner and conditions of the acquisition of a water right can be justified. If the general government owns the waters of the streams flowing through the public domain, what right has a state to pass laws looking to their disposition? Why must one adhere to the laws of Montana or of Wyoming in the acquisition of a water right in those states, respectively, if the property right to be acquired belongs neither to the one nor to the other, but to the United States? Are all these laws, truly enacted with reference to a subject matter of which the states have no jurisdiction whatever? Not at all. They are legislating with reference to the disposition of their own property and their own rights, and Congress recognized this in the Act of 1866. The validity of legislation of this character was upheld

in

Gutierrez vs. Albuquerque Land & Irrig. Co.
188 U. S. 545.

Now if the complainant and the intervenor in this case must look to the State of Wyoming for whatever rights they have to the waters of Sage Creek, it follows logically that they have no water right which they can assert in this Court against these defendants. If the State of Wyoming owns all the waters in that state, it follows, "as the night the day," that the State of Montana owns all the waters in that state; that neither the one nor the other enjoys any priority, and that neither can grant any priority as against the other, or any of its grantees. This theory of the ownership of water rights contemplates that from the beginning the waters were held in trust for the people of the State that was to be, and which eventually became the owner when it came into existence. Montana owns all the waters within its borders, and Wyoming owns all the water within its borders, each being entitled to dispose of them as it sees fit.

If Montana allows any of her waters to flow down into Wyoming, they belong to the latter state, of course. If any one allows tailings to run away from his mill and to be deposited upon the land of another, having at the time no purpose to reclaim them, they become affixed to—a part of the land on which they lodge.

1 Lindley on Mines, 426.

If Wyoming should allow any of its waters to flow down into Nebraska, they belong to that state.

Montana is under no obligation to give any part of her waters to Wyoming, nor to allow them to flow down into that state, that they may be enjoyed by Wy-

oming licensees of grantees. When appellee Morris and Howell constructed their diversion works, they are presumed to have known that more or less of the waters they were seeking to appropriate came down from Montana, and that she and her citizens might eventually desire to make use of them. So, if one constructed a cyaniding plant on the lower courses of a stream, and caught tailings coming down, he could not complain if the owner of the mill from which they came decided to change his policy, and impound them.

This view of the law and of the rights of the states gives no advantage to Montana, nor to any state. What more reasonable rule than that the people of Montana own the waters that fall from the heavens upon their soil and that they are, and of right ought to be, entitled to place them to any beneficial use they may see fit until they pass beyond the borders of that state? So Wyoming owns all the bounties of the heavens that fall on her fields and mountains, but when she allows them to get away from her into Nebraska or Kansas, she has no means, as she has no right, to reclaim them. Why should the states east or west, as the climate grows more and more humid, claim not only the rain that falls on them, but a part of that which comes to bless their neighbors in the higher and dryer regions?

But if it were a fact that this theory of the law would place the people of Montana at an advantage, that is their good fortune. They may enjoy it themselves, or they may admit their neighbors to share it with them. In

McCready vs. Virginia, 94 U. S. 391,

the Court held valid a law of Virginia excluding citizens of other states from planting oysters within tide waters

of that state. It was held that, as these waters belonged to the State of Virginia and its people, they might reserve them to their own use, or share them with others, as they saw fit.

Once the proposition is admitted that the state owns the water—all the water—of all the streams within its borders, it follows that it may establish the system of riparian rights or of appropriation whichever it sees fit, and it equally follows that a citizen of one state diverting water from a stream therein can claim no ownership in, or right to, waters of any stream while they are within a neighboring state, but that the right to such waters, and to the use of them, is, and must be, in the state wherein they are, or in some one who is taking them from the stream by authority of that state.

This is the position taken by the State of Colorado in the action now pending between it and the State of Kansas in the Supreme Court of the United States. It was argued before that august tribunal on a demurrer to the bill in the suit referred to, and expressly reserved as too grave to be passed on until the necessity to do so arose, if it should, on the final hearing.

Kansas vs. Colorado, 185 U. S. 125.

The Supreme Court of Colorado considered a closely related question as to whether water could be diverted and appropriated in Colorado for use on lands in New Mexico, but found it unnecessary to decide the question.

Lanson vs. Vailes, 61 Pac. 231.

The same question involved in the last cited case was presented to the Supreme Court of Wyoming.

Willey vs. Decker, 73 Pac. 210.

That Court, having committed itself unqualifiedly to the

rule of state ownership—the "Colorado doctrine"—reaches the conclusion by a course of reasoning difficult to trace, that the courts of that state may enjoin one who, under its laws, diverts water in that state from a stream having its source in Montana, of whose waters defendant made an earlier appropriation in Wyoming, but for use in Montana. It is but just to say that though the question was deemed by the trial judge so important that he certified it up pursuant to a provision of the constitution of that state, the Court itself declares that it did not have the assistance of counsel for the defendant. It had but one side of the case argued, and decided in favor of the party represented.

The question presented could have been readily solved upon a theory in entire harmony with the views of the Court expressed in earlier opinions. It would have been sufficient to say that the State of Montana had not abandoned to the State of Wyoming and its citizens all the water which it allowed to run down the stream in question, but only so much as was in excess of the needs of the plaintiff for use in Montana. The very fact that the Montana citizen was ready with his ditch to take it out, though in Wyoming, to carry it on to lands in Montana disproved any intention to abandon. It presented simply a question of the right of the Montana claimant to occupy the Wyoming soil with his ditch; or at most, the question of whether the Wyoming law permitted him, a citizen of Montana, to come within the State of Wyoming and carry water through this ditch to lands beyond its borders. That question is clearly determined wholly by the construction of the Wyoming statutes. In fact the Court recognized, in one part of its opinion,

that this was the real question in the case. (73 Pac. 222.) But the Court proceeded to the consideration of the case as though it presented the identical question involved in this action, whether an appropriator in Wyoming can come into a court in Montana and enjoin an appropriator in Montana from diverting water from a stream that flows throughout its course as far as the point at which he diverts it for use on lands in Montana.

The views expressed by the Court in

Farms Investment Co. vs. Carpenter, supra,

are reiterated at considerable length.

The attention of the Court was invited to the irreconcilability of the position taken by the learned District Judge in Howell vs. Johnson, supra, and that assumed by the Wyoming court in the case named,—the one asserting a Federal, and the other a State origin of water rights. On that very difference of opinion, the decision in Howell vs. Johnson turned, the counsel for the defendant taking the position asserted by the Wyoming court in Farms Investment Co. vs. Carpenter; the Court, the other view. Because, the Court held, the right to the water came by grant from the general government, not restricted in the disposition of the public lands and their incidents by state lines, a right was acquired by complainant, which he could assert anywhere.

Though the decision in Howell vs. Johnson was called to the attention of the Court in Farms Investment Co. vs. Carpenter, by the brief of counsel (9 Wyo. 113), the Court refused to follow its reasoning, and yet when it canvasses, in Willey vs. Decker, supra, the question it assumed to be involved, it said:

"The Federal Court sitting in Montana recognized a similar right in the case of a Wyoming appropriator from another stream flowing from Montana into Wyoming, and held that an invasion of his rights by the diversion of water in Montana might be enjoined. Howell vs. Johnson (C. C.) 89 Fed. 556. In that case the learned judge said: 'The idea that there can arise any international water right question in the case of an appropriation of the waters of an unnavigable stream cannot be maintained. The rights to such waters, after the national government has disposed of them, must always be a question pertaining to private persons.' Some expressions contained in the opinions in that case, in respect to state ownership and control of the waters of unnavigable streams have been supposed destructive of an essential principle in the law of irrigation. It is not necessary that we agree with all the reasons given by the Court for the conclusion announced, nor that we assent to all the views expressed in the opinion. We think there can be little question but that it was rightly held that the plaintiff in the case had secured a right by appropriation to the waters of the stream, as against a subsequent appropriator in the other state, which might be protected in the courts of such state against injury by acts occurring therein."

The case is not persuasive for the reasons suggested.

Perkins County vs. Graff, 114 Fed. 441, is referred to in Willey vs. Decker, as shedding some light on the questions involved. It is more pertinent to the case there presented than here. It involved the question of the validity of bonds issued to bring water out of a stream

in Colorado for the irrigation of lands in Nebraska. It can be seen that, at best, that simply presented the question as to whether such permission was granted by the laws of Colorado, and nothing in the opinion aids us in the solution of the question here involved.

The matter came incidentally before the Court in

Conant vs. Deep Creek Co., 66 Pac. 188,

and without much attention to the subject, apparently. Howell vs. Johnson was approved.

The question is to be solved, as we submit, by a determination of the question as to whether the right arises by a grant from the general government, or whether the citizen of a state enjoys his appropriation by virtue of the state's ownership of waters within its borders. It is respectfully submitted, for reasons considered, that the latter theory must be adopted, as more consonant with the views expressed by the Supreme Court of the United States.

II.

THE RIGHTS ACQUIRED IN WYOMING WERE SUBORDINATE TO THE RIGHTS ACQUIRED IN AND ON THE CROW INDIAN RESERVATION IN MONTANA.

But there is a special reason why, even though the principle should not be deemed of universal application, the result to which it leads must be arrived at here. The Crow Indian Reservation, defined by the Treaty of May 7th, 1868, embraced all of the County of Carbon, Montana, its southern boundary being coincident with the southern boundary line of that state.

Revision of Indian Treaties, p. 327.

By the treaty of 1890 the lands occupied and owned by

the appellants and watered by them from Sage Creek, as well as the head waters of that stream, were thrown open to settlement. Theretofore, no one was permitted to go within that region to acquire either lands or water rights. The citizens and settlers of Wyoming might occupy the territory right up to the Montana line for a stretch from the 107th Meridian West, to where the Yellowstone River crosses it, a distance of 150 miles, and might, if the contention of the appellant is correct, appropriate every drop of water collected in that vast and now marvelously productive and wealthy region, which should flow southward, leaving it, when it should eventually be open to settlement, a parched and hopeless desert. By what right may the citizens of Wyoming thus claim a priority in these waters over those of Montana? If they may, our state is most grievously burdened by its even now vast Indian Reservations. When they are eventually opened, as they are now fast being, we may find that citizens of other states have, by virtue of acts done therein, acquired the right to come within our state and appeal to the courts to divest the settlers on them, of the waters taken from the streams that flow through their lands, and have their sources within the newly opened territory.

Fortunately, a recent decision of this Court promises to exempt us from such a calamity. It was held in

Winters vs. The United States, 143 Fed. 740,

that the waters flowing through, or bordering on the Belknap Indian Reservation were reserved for the use of the Indians occupying the Reservation, and were not subject to appropriation.

The same consideration which led the Court to the

conclusion at which it arrived in the case forces the conviction that the waters in question in this case were not subject to appropriation until after the opening of the Crow Reservation, and then at least for a reasonable time only by the settlers thereon.

The Government recognizes a kind of property right on the part of the Indians to the waters as well as the lands of the reservation. In Winters vs. U. S., this view is adopted. For many years the policy has been pursued of reducing the area of these reservations upon some consideration flowing to the Indians. Our whole vast state, or the greater portion of it, was at one time one or more Indian reservations.

Winters vs. The United States, supra.

It was contemplated many years ago that eventually the lands within the reservations would be thrown open to settlement, and an equivalent given to the Indians. More recent statutes provide for the entry of land so opened under the homestead law, with a payment, the benefit of which flows to the Indians. Such are the provisions of a late act of Congress again reducing the limits of the Crow Reservation.

Is it possible that citizens of Wyoming, under the sanction of either state or federal legislation, had the right to appropriate to themselves all the waters of the reservation by diversions made in Wyoming so that when they should eventually be thrown open to settlement, the Indians could realize nothing for their lands over and above the trifle at which they would sell for purely grazing purposes?

An act passed at the last session of Congress opening the Blackfeet Reservation, applying the law announced in

Winters vs. United States,

provides for the allotment in severalty to the Indians of lands in the reservation, and the entry of the remainder at a price fixed, the amount realized to become a trust fund for the Indians, and further provides that *not only the Indians but the settlers purchasing*, shall have a prior right to the use of so much water as they may divert for the purpose of irrigation within two years from the opening of the reservation. The priority given to the settlers is given, of course, to increase the salability of the lands. Can it be denied that such a provision in the act of opening the Crow Reservation would have been valid, and that the settlers on the reservation would have had the priority? But if they would it would be because the Wyoming diverters had acquired no right, since if they had acquired a priority right they could not be diverted of it by a subsequent act of congress.

As the waters of the Crow Reservation were not subject to appropriation when the complainant and the intervenor claim to have made their appropriations, they cannot maintain this action. At least a court of equity will not put forth its arm to aid in the enforcement of so inequitable an advantage if, even as a matter of strict legal right, the appellees enjoy it.

The suggestion made by the learned district judge that assuming that the waters were not subject to appropriation prior to the opening of the reservation, the appropriations became effective *eo instanti* upon the accomplishment of that fact, does not meet the case, and nothing in the decisions cited in support of this view seems to sustain it. The waters are for all practical purposes subject to appropriation, if, immediately upon the reser-

vations being opened, prior appropriations take life as against those made on the land made subject to entry. However diligent settlers on the newly opened lands might be, they could by no possibility secure a priority.

Under the law as announced in the Winters case, the right to the use of water on the reservation belonged to the Indians as an incident of their ownership or their right to occupy the lands within it, and passed on the opening of the reservation to those who appropriated the lands under the act of Congress making them subject to entry.

III.

LACHES, ADVERSE USER AND ABANDONMENT.

And if the court ever would give to appropriators such an advantage, it ought not to do it in this case where the evidence shows that the appellees slept on their rights for ten years and more before bringing this action.

It is conceded that as to the intervenor—in fact he himself tells—that he began to suffer because of the want of water in the fall of the year 1893, the shortage being occasioned by the diversions of the defendants. His petition was filed September 5, 1903.

The complainant says he has been short of water since 1894 because the defendants have taken it, and the evidence is undisputed that he has not raised any crops for five or six years. No explanation whatever of this long delay is made; no excuse is offered. No reason is assigned why this suit or some similar action was not begun long ago. The appellants might very well believe, by reason of this long inactivity and failure to question their rights or to interrupt their acts that their right to

the water was conceded. Assuming it to be, they made expensive improvements by which their lands have become producing farms and orchards. The character of improvements—if that term can be used properly in this connection—on the lands of complainant and intervenor is shown by photographs introduced in evidence.

Transcript, pages 428-429.

The full period of the statute of limitations of both Montana and Wyoming has run against the claim of the intervenor, ten years barring actions to recover realty in both states. But a Wyoming statute is more important. It provides:

> "And in case the owner or owners of any such ditch, canal or reservoir shall fail to use the water therefrom for irrigation or other beneficial purposes, or shall refuse to furnish any surplus water to the owner or owners of lands lying under such ditch as hereinafter provided, during any two successive years, they shall be considered as having abandoned the same, and shall forfeit all water rights, easements and privileges appurtenant thereto, and the waters formerly appropriated by them may be again appropriated for irrigation and other beneficial purposes, the same as if such ditch, canal or reservoir had never been constructed."

Sec. 895, Rev. Stats. Wyoming, (1899).

The learned district judge erroneously considered this as a statute of abandonment, and held that the intention to abandon not being shown, the statute is in applicable. This is a statute of non-user, not of abandonment. It is immaterial why the complainant or intervenor did not use the water. Their failure to use it worked a forfeiture

of their right. The difference between a statute of non-user and one of abandonment is pointed out in

Long on Irrigation, 83.

Abandonment is a question of intent. Failure to use the water, no matter how long continued, does not constitute abandonment. Non-use is evidence of abandonment, but the intent is the essential feature. And on the other hand, if a purpose is established not to use any more, it is immaterial how long the non-use has continued.

Under a statute of non-use, however, failure to use for the statutory period, whatever the reason, or however strong may be the purpose to use again at the first opportunity, works a forfeiture. These principles are sustained by the case of

Smith vs. Hawkins, 110 Cal. 122.

The statute operates as a statute of limitations. No other construction can possibly be given to the statute. The purpose to make the waters of the state available to the utmost is evident throughout the legislation of the State of Wyoming. In the absence of this law, water which had been appropriated but the right to which the appropriator intended to abandon, would have become subject to appropriation by another the instant he carried out his purpose and ceased using. It certainly was not intended by this law that notwithstanding one had formed a fixed purpose not to use the water again, it should remain unavailable for a period of two years during which time he might be at liberty to change his mind and reclaim it. Clearly not. Its purpose was to fix a limit after which one might safely take it and apply it at expense to some beneficial use without being met subse-

quently with proof of a purpose on the part of the original owner to resume its use at some later day.

In this case the intervenor frankly and bluntly tells that he quit using the water or trying to use it in 1897, and determined not to attempt any further raising of crops until his right to the water should be settled. But under this statute he was obliged, having reached that determination, to commence his action within two years. His averment of a present right to the use of the water is overcome by the facts he submitted in proof.

The evidence places the complainant in the same position. He too has delayed too long.

Nor is it necessary that the *whole* period of the statute should have run in order that the complainant and intervenor should be denied a right of recovery in this suit.

Appeal is made here to a court of equity. The complainant and intervenor are not entitled to a decree when they show only a strict legal right. They ask for the extraordinary remedy of injunction. The prayer for the injunction is the basis of the jurisdiction, and it is the only relief awarded. The necessity for the prompt and diligent assertion of his rights on the part of one seeking the aid of equity has been repeatedly declared by the Supreme Court of the United States. In

Abraham vs. Ordway, 158 U. S. 416,

is the following:

> "The property in dispute, it may well be assumed, has greatly appreciated in value since Mrs. Ordway's purchase, which was more than ten years prior to this suit. It is now too late to ask assistance from a court of equity. The relief sought cannot be given consistently with the principles of justice, or with-

out encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitation; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. It will, in such cases, decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedy as he may have in a court of law. Wagner vs. Baird, 7 How. 234, 238; Harwood vs. Railroad Co. 17 Wall 73, 81; Sullivan vs. Portland, etc. R. R. 94 U. S. 806, 811; Brown vs. the County of Buena Vista, 94 U. S. 157, 159; Hayward vs. National Bank, 96 U. S. 611, 617; Landsdale vs. Smith, 106 U. S. 391, 392; Speidel vs Henrici, 120 U. S. 377, 387; Richards vs. Mackall, 124 U. S. 183, 188.

"The appellants insist that, as this suit relates to land, the doctrine of laches as announced in the above cases, has no application. There is no foundation in the adjudged cases for this suggestion. It is true, as stated by counsel, that in Wagner vs. Baird, just cited, the court says that in many cases courts of equity 'act upon the analogy of the limitation of law, as where a legal title would in ejectment be barred by twenty years' adverse possession,' and 'will

act upon the like limitations, and apply it to all cases of relief sought upon an equitable title, or claims touching real estate.' But it proceeds to say: 'But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation distinctly governs the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights. 2 Story Eq. Sec. 1520. A court of equity will not give relief against conscience, or where a party has slept upon his rights.' "

From

Insurance Co. vs. Austin, 158 U. S. 685,

we make the following extract:

"The preliminary inquiry, therefore, is whether the complainants have so exercised their rights as to entitle them to prevent the city from completing the water works.

"In Speidel vs. Henrici, 120 U. S. 377, 387, the court said, speaking through Mr. Justice Ray:

" 'Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience,

good faith and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.'

"In Hammond vs. Hopkins, 143 U. S. 224, 250, through Mr. Chief Justice Fuller, the court said:

" 'No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there has been gross laches in prosecuting rights, or where a long acquiesence in the assertion of adverse rights has occurred.' "

In Willard vs. Woods, 164 U. S. 502, 524, the Court said:

" 'But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded, or the bill demurred to. Sullivan vs. Portland, & Kennebec R. R. 94 U. S. 806, 811; Lansdale vs. Smith, 106 U. S. 391, 394; Badger vs. Badger, 2 Wall. 87, 95.' "

In the opinion filed by the learned District Judge, who ordered the decree in this cause, it is said in extenuation of, if not as a complete answer to, the claim of laches on the part of the complainant that he "has protested while the supply of water grew less from year to year until

finally his ills became unbearable."

Transcript, page 653.

Even if he had done so, his conduct would be no answer to the claim of laches. In Willard vs. Woods, already quoted from, the court said:

> "In Lane vs. Bodley Co. 150 U. S. 193, and Mackall vs. Caffilear, 137 U. S. 556, it was held that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches."

But what are the facts?

The complainant testifies that he never made any complaint whatever about the water, that in the year 1898 he saw appellant Bean about water. Just what he said to Bean does not appear, but whatever he said was not by way of complaint. Bean said: "that he was going to irrigate that afternoon and he would turn the water down, and he turned the water down the creek, and it run about a half a day; then the water was shut off again."

Transcript, page 259.

In the year 1902, he went to see appellant, Wallace Bent. What was said to Bent does not appear in the record, but the complainant says: "Mr. Bent said that he would not let me have any water."

Transcript, page 258.

Complainant testifies that these two efforts are all he can remember to have made.

Transcript, page 250.

The testimony is entirely consistent with the idea that he requested that the water be allowed to come down to him as a neighborly accommodation.

The intervenor, it will be remembered, testified that complainant had been unable to raise any crops since 1894. He, himself, testified that he had not had more than half enough water for five years.

It does appear, indeed, in the evidence that at one time the intervenor instituted a suit such as this—doubtless the case of Howell vs. Johnson—but there is no pretense that it was brought against any of these appellants. While, on the issue of abandonment, the prosecution of a suit against some one other than these appellants would be pertinent as showing his intent to use the water again, on the issue of laches raised by them, it is no answer at all.

Ignorance of the wrong is the usual excuse for laches. Of course, if protest were made, it would be impossible to aver ignorance. Such a condition would tend to establish, rather than overcome laches.

The burden of establishing facts to overcome the indisposition of courts of equity to enforce rights where long delay in their assertion has ensued, is on the complainant, and unless he avers the existence of such facts in his bill, it is demurrable. In

Hardt vs. Heidweyer, 152 U. S. 547,

the court says:

> "It is well settled that a party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also when and how knowledge was obtained, in order that the court may determine whether reasonable effort was made by him to ascertain the facts."

The Court also in that case quotes from Badger vs. Badger, 2 Wall. 87, 95:

> " 'The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matter alleged in his bill.' "

To avoid, apparently, the force and effect of this rule, the complainant alleged in his bill that the wrongs complained of had continued only during "the past three years," that is, the years 1900, 1901 and 1902. He did not frame his bill on the theory that he had been deprived of his water by any act of the defendant since the year 1894, because, had he done so, the bill would have been demurrable for laches appearing upon its face. Even if he had averred that, for five years, he had been deprived of water essential to the raising of crops, some explanation of his delay would have to be made in his bill, before a court of equity would interpose in his behalf. It might, in this connection, be remarked that, prior to 1895, five years would, in Montana, have absolutely barred his rights, as is the case, or until recently was the case, in California. What excuse could now be made in the bill, if leave were asked to amend it to make it conform to the proof?

Take the case of the intervenor. He expressly averred that he has had the use of his appropriation to its full extent since August 1st, 1890, which sweeping assertion he followed with the further averment that, within five years the defendants had constructed dams and ditches,

and that within two years they had deprived him of the water to which he is entitled.

Suppose he had averred in his petition that he had been unable to get water since 1894 sufficient to grow crops, and that in despair he quit trying to raise them after 1897; he would, likewise, have been obliged to make some averment to relieve himself of his evident laches in seeking relief. And what avail would it have been to him, in opposition to a demurrer by these appellants, to have averred in his petition that, at some time in the interim, he had begun an action against somebody to prevent interference with his right.

Even though a strict right may possibly be in the parties in whose favor the decree runs, they have no standing whatever in a court of equity. If a complete case of estoppel is not made out, in view of the expenditures made by the appellants in reliance upon their right to the water, a case is presented in which, if it ever should, the doctrine of laches ought to be applied.

IV.

EXTENT OF RIGHTS OF COMPLAINANT AND INTERVENOR.

And particularly should it be applied in view of the pettiness of the right which the complainant established. His claim that he irrigated one hundred acres is without any support whatever in the record, and the overwhelming weight of the evidence, referred to in the earlier part of this brief, is to the effect that he never watered more than twenty-five acres. He had the uninterrupted use of the water from 1887 to 1893. After seven years the extent of his right ought to be measured by the applica-

tion he has made of the water diverted. He had had abundant opportunity since 1887 to put so much of his one hundred and sixty acres under cultivation as he saw fit. The intervenor put 110 acres of his land under cultivation between 1900 and 1903.

There is no justification in the testimony for awarding to complainant any more water than is sufficient for the irrigation of twenty to twenty-five acres. The evidence would justify an inch to the acre, but a law of the State of Wyoming forbids awarding any more than one cubic foot per second for each seventy acres of land, for which any appropriation may be made.

> "At the first regular meeting of the board of control, after the completion of such measurement by the state engineer, and the return of said evidence by said division superintendent, it shall be the duty of the board of control to make, and cause to be entered of record in its office, an order determining and establishing the several priorities of right to the use of waters of said stream, and the amounts of appropriations of the several persons claiming water from such stream, and the character and kind of use for which said appropriation shall be found to have been made. Each appropriation shall be determined in its priority and amount, by the time by which it shall have been made, and the amount of water which shall have been applied for beneficial purposes. *Provided*, That such appropriator shall at no time be entitled to the use of more water than he can make a beneficial application of on the lands, for the benefit of which the appropriation may have been secured, and the amount of any appropriation

made by reason of an enlargement of distributing works, shall be determined in like manner. *Provided*, That no allotment shall exceed one cubic foot per second for each seventy acres of land for which said appropriation shall be made."

Section 25, Act of 1890- Laws of Wyoming 1890-91, page 98

The application to a beneficial use is an essential part of an appropriation. If the water was never applied to the irrigation of more than twenty-five acres no appropriation was ever made for more than twenty-five acres. This law, as well as the one above referred to touching non-user, becomes a part of the right, a limitation to which it is subject in any state where an attempt may be made to enforce it.

Davis vs. Mills, 194 U. S. 451.

Another law of Wyoming provides:

"A cubic foot of water per second of time shall be the legal standard for the measurement of water in this state, both for the purpose of determining the flow of water in natural streams, and for the purpose of distributing water therefrom."

Section 38, Act of 1890, Laws of Wyoming, 1890-91, page 102.

In view of these legislative acts it is difficult to see how the decree in this case can be sustained, either as to the complainant or the intervenor. The complainant affords no basis in his bill for a decree awarding him water measured by the standard by which alone he is entitled to have it decreed to him under the Wyoming law. On the other hand the intervenor avers in his petition that he is entitled to 6 1-4 cubic feet per second

and without any averment whatever in his petition advising the court as to the quantity of water that is measured by the miner's inch as the standard, he is awarded, 110 inches, miner's measurement.

The petition in intervention does not support the decree in behalf of the intervenor; it is unsupported in respect to the amount awarded by any pleading whatever. The rule that the judgment must be supported by the pleadings is as firmly established in the equity practice as it is at law.

Fletcher's Equity, 712.

Nor would the situation be improved if proof had been made of the relation between the two methods of measurement, for it is the rule in equity also that "the court can no more consider what is proved, but not alleged, than what is alleged, but not proved."

Fletcher's Equity, 636.

The complainant's case is in no better shape. He avers an appropriation of 250 inches statutory measurement and is decreed 100 inches "miner's measurement."

A Montana statute provides as follows:

> "Section 2. Where water rights expressed in miners' inches have been granted, one hundred miners' inches shall be considered equivalent to a flow of two and one-half cubic feet (18.7) gallons per second; two hundred miners' inches shall be considered equivalent to a flow of five cubic feet (37.4) gallons per second, and this proportion shall be observed in determining the equivalent flow represented by any number of miners' inches."

Session Laws, 1899, page 117.

But that, however, is an arbitrary statutory rule, and it need not be said that the extent of the rights of complainant and intervenor is to be determined by the Wyoming law, not that of Montana. But if the relation between the two standards fixed by the Montana law should be regarded, then intervenor, irrigating one hundred and ten acres, is entitled, not to one hundred and ten inches of water, but to forty-seventieths of one hundred and ten, or sixty-three inches; and complainant is entitled to forty-seventieths of twenty-five inches or fourteen inches.

But if the Wyoming law making the cubic foot per second the standard of measurement and limiting the right of the appropriator to one cubic foot for each seventy acres is to be disregarded, still the decree is so indefinite as to the amount awarded as to be incapable of enforcement. What quantity of water is a miner's inch? It is one quantity in one community and another in another.

The Court held in

In re Huntley, 85 Fed. 889-983,

that a decree awarding "150 inches, statutory measurement," is void for uncertainty.

Long on Irrigation, 97,

says:

> "So, also, where the plaintiff alleged in his complaint that he was entitled to 'five hundred inches, measured under a four-inch pressure,' of the waters in controversy, a verdict of the jury that he was entitled to 'forty inches, miners' measurement,' was held void for uncertainty, since the term 'miners' measurement' has no fixed meaning, and the miners'

inch varies in different localities,"

and for the text the author refers to

Dougherty vs. Haggin, 56 Cal. 522.

It is well known that, other considerations being disregarded, water is measured by miners in some places under a four inch pressure and in others under a six inch pressure. Anyway, the amount of water to which the complainant is entitled (we say nothing of the intervenor because it seems altogether clear that as to him the decree cannot be sustained) is so pitifully small that in view of his laches, he ought not to have the equitable remedy of injunction against these defendants.

V.

THE SINKING OF THE WATERS OF SAGE CREEK

And to whatever conclusion the court may arrive on consideration of the voluminous testimony concerning the character of the bed of Sage Creek, as to whether water in sufficient quantity to be of any substantial value to him would reach complainant's place were the flow uninterrupted by the defendants, it is undeniable that a quantity vastly in excess of anything to which complainant may be entitled, must be allowed to run down, in order that he may get the trifling quantity to which his limited irrigated area entitles him.

It is submitted that the very decided preponderance of the evidence is that though the appellants diverted no water, complainant would get none—once the dry season sets in, before which there is enough for everybody. But whether that is true or not, it would be inequitable and unjust that the appellants should be deprived of two to three hundred inches of water that complainant may get not more than 25. This condition affords an addi-

tional reason why he should be relegated to a court of law for such relief as he can there obtain, and he should be held barred of his equitable remedy by his long and unexcused delay in seeking it.

VI.

AMOUNT IN CONTROVERSY.

The consideration of the inconsequential character of the interest which the complainant succeeded in establishing leads to the question of the amount in controversy.

The bill alleges that the amount in controversy exceeds $2000, exclusive of interest and costs, but whether it does or not is to be determined from the facts stated. If the just conclusion from those facts is at variance with the mere conclusion of law which the averment referred to expresses, it can have no weight. The thing in controversy, as was justly said by the learned district judge, is the complainant's water right. On the value of that right depends the jurisdiction of the court. That right is averred in the bill to be of the value of $2000.

Transcript, page 5.

Of course, a controversy involving a right of the value of $2000 does not fall within the jurisdiction of the United States Circuit Court. The amount involved must exceed $2000.

It is true the bill avers that the complainant has been damaged in the sum of $2500 by defendants' interferences with his water right, but damages in equity can be awarded only as incidental to the main relief. The jurisdiction to award damages is a *dependent* jurisdiction. If the court of equity has no jurisdiction over that feature of the controversy, by reason of which alone it is entitled to hear the cause, because the value of the litigated right

is not sufficiently large, its jurisdiction cannot be helped out by the amount of damages claimed in consequence of an invasion of that right.

But more. The damages that might be awarded could not by any possibility exceed the value of the property right injured. One cannot recover damages for injury to property in excess of its value.

Lentz vs. Carnegie, 27 Am. St. Rep. 717.

If the complainant were, by proceedings in eminent domain, deprived for all time of his water right his damages, conceding its value as averred in his bill, would be just $2000. It is apparent, then, that that is the amount in controversy. Accordingly, we insist that the bill shows on its face that the court has no jurisdiction and we submit that the evidence confirms the want of jurisdiction disclosed by the bill.

Undoubtedly in actions "sounding in damages" the amount claimed as damages controls. But this is not an action sounding in damages. It is an action in equity for an injunction, damages being asked as merely incidental relief. It is more nearly like an action to quiet title in which the value of the property is the test.

Simon vs. House, 46 Fed. 317;

Smith vs. Adams, 130 U. S. 167.

> "In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. Bar-

ray v. Edmunds, 116 U. S. 550, 560; Wilson v. Danier, 3 U. S. 3 Dall. 401, 407."

Vance vs. Vandercook, 170 U. S. 468-472.

"Value Distinguished from Amount—Property Rights Involved.—Where property itself or its title is in litigation, or some question *per se* affecting its enjoyment and possession, its value is the real matter in controversy, as distinguished from the claims of the contending parties."

1 Ency. Pl. & Pr., 726.

For want of a showing by the bill of a dispute in which the amount exceeds $2000, the court never acquired jurisdiction. On principles elsewhere adverted to the finding of the court that the complainant's right is of the value of $3200 does not aid. The decree must be supported by the bill. The finding was made, of course, on the basis of a right in the complainant to 100 inches.

VII.

CITIZENSHIP OF INTERVENOR.

It is conceded that the intervenor, Howell, is a citizen of Montana. He resides at Billings, in that state. No attempt was made to show that at the time of filing his petition, or at any time since, he resided in Wyoming.

The decree, so far as it awards him any rights, cannot stand. It is sought to justify it on the ground that the jurisdiction of the court being invoked by complainant Morris, Howell had a right to intervene, and have his rights adjudicated, even though he should be a citizen of Montana. To this proposition we most respectfully dissent. It is conceded that when, by virtue of any action, property is brought before the Federal Court of Chancery, which is to be disposed of in the action, any

person claiming an interest in the property may be made a party without regard to citizenship. Thus, in an action to foreclose a mortgage, judgment creditors or holders of mechanics' lien may be admitted as parties, for the purpose of establishing their rights, without reference to their citizenship.

Lilienthal vs. McCormick, 117 Fed. 89.

So in admiralty, which usually proceeds *in rem*, any one claiming a lien upon, or interest in the property in litigation may come in.

It is plain from

Rouse vs. Letcher, 156 U. S. 47,

that to warrant an intervention without respect to the citizenship of the intervenor, the property that is the subject of the action must be *in custodia legis*. But there is no property before the Court in this case. There can be none. The property which was made the subject of the bill of complaint—complainant Morris' water right—is not in Montana, but in Wyoming, beyond the jurisdiction of the court. The jurisdiction to proceed at all in this case can be maintained only on the theory that it is a purely personal action.

The Circuit Court for the District of Montana cannot adjudicate on water rights in the State of Wyoming.

Conant vs. Deep Creek Co., 66 Pac. 188.

But, finding within its jurisdiction one who threatens to do the complainant a wrong with reference to property beyond its jurisdiction, a court of equity will bring his person before it, and restrain him from doing that wrong. This case proceeds upon the theory of

Penn vs. Lord Baltimore, 1 Ves. 444, and

Massey vs. Watts, 6 Cranch. 148.

(See Notes to Penn vs. Lord Baltimore, in
(II. Leading Cases in Equity, 1817)

namely, that it is a personal action.

His appearance here can confer no jurisdiction on the court over any controversy between him and these defendants.

> "The Circuit Court cannot take jurisdiction of an intervention in a merely personal action in which no fund has come into the possession of the Court by one who is a citizen of the same state as the party against whom his complaint is directed."

Seligman vs. City of Santa Rosa, 81 Fed. 574.

In that case Judge Morrow referred to the case of

United Electric Co vs. La. Electric Co. 68 Fed. 673,

in which one of the propositions determined is thus expressed in the syllabus:

> "Where jurisdiction rests upon the diverse citizenship of complainant and defendant, and during the proceedings, a third party, who is a citizen of the same state with defendant, intervenes, the court will have no jurisdiction of his controversy with defendant, unless the controversy between complainant and defendant is one which draws to the court the possession and control of defendant's property, in which the intervenor claims some interest."

Howell had no right to intervene in this action, and the order permitting him to do so was erroneous.

And, the complainant having voluntarily assented to his intervening, the jurisdiction of the court was destroyed.

Forest Oil Co. vs. Crawford, 101 Fed. 849.

In that case, the plaintiff, claiming an undivided interest in certain lands, brought his action to quiet his title, alleging diverse citienship. Afterwards other citizens of the same state with the defendant were permitted to intervene, and establish with plaintiff their joint claim against the defendant. The Circuit Court of Appeals for the Third Circuit held the jurisdiction failed, saying:

> "We cannot shut our eyes to the quite apparent fact that he voluntarily assented to the irregular proceedings by which his bill, even if otherwise maintainable, was made fatally defective by the misjoinder therein of others as his co-plaintiffs. He seems to have been entirely satisfied to have the interposing parties united with himself, to assert with them a joint claim, and to recover with them a joint judgment: and he should not, we think, be now relieved from the consequences of his association."

Forest Oil Co. vs. Crawford, 101 Fed. 852.

Although this is not a joint judgment, nor do the intervenor and complainant prosecute a joint claim, still had they united in the first instance, as they might very properly have done, to assert jointly their several claims and to obtain a judgment requiring the defendants to allow to flow down the stream the sum of 110 inches and 100 inches of water, there could be no doubt that the court would be powerless to proceed for want of jurisdiction.

The court very properly held that it had no jurisdiction to adjudicate the rights of the defendants as against each other. But unless the intervenor is a citizen of some

state other than Montana, it had as much right to do so as it has to adjudicate the rights of the intervenor as against the defendants. The ruling which was made amounts to this—that had the complainant made Howell a defendant, and had Howell in his answer or in a cross-bill asserted his rights against all the other defendants, as he has done in his petition in intervention, the Court could not adjudicate them; but since he comes in as an intervenor, it may. Or had the complainant omitted to make one of the defendants parties, he might intervene, and get a decree adjudicating his rights, as against all the defendants, relief denied to him by reason of the fact that he is a citizen of the same state with the other defendants.

No authority is necessary to establish that when a fund is in court, even in a Federal Court, and parties are made defendants who claim an interest in it, their rights as against each other are properly adjudicated in the action.

VIII.

THE NOTICES OF LOCATION.

It was conceded in the trial court that the notice of his appropriation filed by the complainant did not conform to the requirements of the Wyoming law in force at the time the appropriation was made, but it was insisted, and the court held, that the method of making an appropriation defined by the statute was not exclusive but that by following it the appropriation related back to the initial act prescribed by the law to be done. And it was said that Moyer vs. Preston had practically so held, which is doubtless true.

But it will be impossible, as we take it, for

any court to hold that since the enactment of the law of 1890 it is possible to acquire a water right in Wyoming except upon compliance with its terms. The whole scheme and purpose of that act was to do away with the contentions and controversies, the uncertainties that arose by reason of promiscuous appropriations made without any official surveillance. The scheme of the act was to afford, through the office of the state engineer, exact information to subsequent appropriators as to the quantity of water already appropriated from any particular stream; to deny to any person the right to place upon record a notice of appropriation of water in amount vastly in excess of what he could beneficially use, and to prevent him from asserting in any other way, to the deterrence of those who might desire to make subsequent appropriations, a right to more water than could reasonably be decreed to them, should his right be adjudicated.

This plan and purpose is deduced from the act as a whole, rather than from any specific provision, but it is sufficiently evidenced by Section 34, as follows:

> "Sec. 34.—Every person, association or corporation hereafter intending to appropriate any of the public waters of the State of Wyoming shall, before commencing the construction, enlargement or extension of any distributing works, or performing any work in connection with said appropriation, make an application to the president of the board of control for a permit to make such appropriation. Said application shall set forth the name and post office address of applicants, the source from which said appropriation shall be made, the amount thereof as near as may be, the location and character of any

proposed work in connection therewith, and the time required for their completion, said time to embrace the period required for construction of ditches thereon, and the time at which the application of water for beneficial purposes shall be made, which said time shall be limited to that required for the completion of work when prosecuted with due diligence, the purpose to which the water is applied, and if for irrigation, a description of the lands to be irrigated thereby; and any additional facts which may be required by the board of control. On receipt of this application, which shall be of a form prescribed by the board of control, and to be furnished by the state engineer without cost to the applicant, it shall be the duty of the state engineer to make a record of the receipt of said application, and to cause the same to be recorded in his office, and to make a careful examination of said application, to ascertain whether it sets forth all the facts necessary to enable the board of control to determine the nature and amount of the proposed appropriation. If, upon such examination, the application shall be found in any way defective, it shall be the duty of the state engineer to return the same to the applicant for correction. If there is unappropriated water in the source of supply named in the application, and if such appropriation is not otherwise detrimental to the public welfare, the state engineer shall approve the same by endorsement thereon, and shall make a record of such endorsement in some proper manner in his office, and return the same so endorsed to the applicant, who shall, on receipt thereof, be author-

ized to proceed with such work and to take such measures as may be necessary to protect such appropriation. If there is no unappropriated water in the source of supply, or if, in the judgment of the state engineer, such appropriation is detrimental to public interests, the state engineer shall refuse such appropriation, and the party making such application shall not prosecute such work, so long as such refusal shall continue in force; and *Provided, however,* That the state engineer may, upon examination of such application, endorse it approved for a less amount of water than the amount stated in the application, and for a less period of time for perfecting the proposed appropriation than that named in the application, and *Provided, further,* That an applicant feeling himself aggrieved by any endorsement made by the state engineer upon his application, may in writing, in an informal manner and without pleadings of any character, appeal to the board of control, and if he shall deem himself aggrieved by the order made by the board of control with reference to his application, he may take an appeal therefrom to the district court of the county in which shall be situated the point upon the proposed source of supply at which the diversion of the proposed appropriation is to be made. Such an appeal shall be perfected when the applicant shall have filed in the office of the clerk of such district court a copy of the order appealed from, certified by the secretary of the board of control, as a true copy, together with a petition to such court, setting forth appellant's reason for appeal. Such appeal shall

be heard and determined upon such competent proofs as shall be adduced by applicant, and such like proofs as shall be adduced by the board of control, or some person duly authorized in its behalf."

Laws of Wyoming, 1890-91, pages 100-101.

That this method of acquiring a water right is exclusive seems to be the view of the Wyoming court.

Whalon vs. North Platte, 71 Pac. 995-998.

There can be no pretense of any compliance on the part of the intervenor, and it is impossible to conceive of his having a water right in Wyoming. According to his own testimony he commenced work on the ditch in August, 1890,

Transcript, page 280,

but did not use any water through the ditch until the next year.

Transcript, page 295.

The notice which he filed states that water was first run through the ditch August 4, 1891.

Transcript, page 304.

The intervenor had not effected appropriation until he actually applied the water through his ditch to the beneficial use for which he made the diversion.

Long on Irrigation, 47;

(3) Farnham on Waters, 668.

Until that time his right was inchoate.

Smyth vs. Neal, 49 Pac. 850.

It was like an inchoate right of dower, subject to legislative control.

Randall vs. Krieger, 23 Wall. 137.

IX.

POINT OF DIVERSION.

Complainant and intervenor fail to allege and prove that they made their appropriations on the public domain, or that they acquired the right to make their appropriation from some riparian owner. Such allegations and proof are absolutely essential, and complainant and intervenor's case must necessarily fail.

Smith vs. Denniff, 24 Mont. 20; 60 Pac. 398;
Cave vs. Tyler, 65 Pac. 1089;
City of Santa Cruz vs. Enright, 30 Pac. 197;
Gould vs. Eaton, 49, Pac. 577.

In Smith vs. Denniff the Court said :

> "But this privilege or right to appropriate the water of a stream can in any and every case be taken advantage of or exercised only by one who has riparian rights, either as owner of the riparian land, or through a grant of the riparian owner."

As complainant and intervenor's points of diversion are not situated on their lands, they must show that they have exercised this right on public domain, or state lands, or obtained the right of diversion of the owner of the soil where they make the diversion.

In Cave vs. Taylor, the court said:

> "The burden of showing the diversion was made on the public domain was upon respondents, if that fact was essential to respondent's asserted rights under the laws of Congress, as we think it was."

The contention based on these authorities was met below by the suggestion that both the California and the Montana cases, or at least Smith vs. Denniff among the latter, recognize riparian rights, and that, accordingly,

it is logical for the courts of those states to hold that the riparian rights must be shown to have been extinguished, either by showing that the appropriation was made on the public domain, when that result would be accomplished by the Act of 1866, or by grant from the riparian proprietors; but that, as riparian rights are not recognized in Wyoming, the authorities are inapplicable. The argument is sound if, indeed, Smith vs. Denniff does hold, as counsel seem to doubt, that riparian rights exist in Montana. But if we reach the conclusion that this proof is unnecessary, because there are no riparian rights in Wyoming, we must reach the conclusion that Cruse vs. McCauley was decided wrongly, and that Howell vs. Johnson proceeded upon an erroneous basis, that there are riparian rights in Wyoming, or are not, just as the laws of Wyoming say, that that state has the absolute right to say what rights either appropriators or riparian owners have in the streams flowing through it; in other words, that it owns the waters within it.

Either one or the other theory must be adopted and adhered to. The state does not own the waters, they belong to the general government or to private owners, in which case the proof must show an appropriation on the public domain, or by leave of the private owner, or the allegation is not necessary because the state owns the water and compliance with its laws is all that is requisite to show title. The appellees cannot have the benefit of both theories.

RESUME.

The decree as to the intervenor should be reversed:

1.—Because the court had no jurisdiction to adjudicate his rights against the defendants, diversity of cit-

izenship being wanting.

2.—Because he never made an appropriation, or was granted leave to appropriate water in the State of Wyoming as required by its laws, and hence never made any appropriation.

3.—Because whatever right he did have is barred by the statute of limitations, and by the statute of non-user.

4.—Because his unexcused laches forbids the granting to him of any relief in equity.

5.—Because as to the quantity awarded to him, it is unsupported by any pleading.

6.—Because the quantity of water awarded to him is uncertain, indeterminate and measured by a standard unknown to the laws of Wyoming.

The decree as to complainant should be reversed:

1.—Because by consenting to the intervenor's becoming with him a party plaintiff, the jurisdiction of the court was lost.

2.—Because whatever right he may have had is barred by the statute of non-user

3.—Because his laches forbids to him any remedy in equity.

4.—Because he never effected an appropriation of more than enough water to irrigate 25 acres,—under the evidence, 25 inches.

5.—Because he avers in his bill that he is entitled to, and the decree awards him, a quantity of water measured by a standard unknown to the laws of Wyoming.

6.—Because the quantity of water awarded to him is uncertain and indeterminate.

It should be reversed as to both complainant and intervenor:

1.—Because such rights as they have in the waters of Sage Creek they have by virtue of the laws of the State of Wyoming, and to such waters only as shall be flowing in that stream in the State of Wyoming, gathered in that state or allowed to flow into it by the citizens of Montana from their state.

2.—Because any right they may have in the waters of Sage Creek is necessarily subject to the rights of appellants, settlers on lands within what was the Crow Reservation, at the time of the appropriation of complainant and intervenor, and appropriators of the water of the reservation.

3.—Because the amount in controversy, as shown by the bill, does not exceed $2,000.00 and the court had no jurisdiction for that reason.

4.—Because the proofs show no appropriation by either of the parties named, on the public land, or on private lands with the consent of the owner.

Respectfully submitted,

GEORGE W. PIERSON and
WALSH & NOLAN,
Solicitors for Appellants.

T. J. WALSH,
Of Counsel.

No. 138.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1910.

J. N. SHAN, W. E. BAINBRIDGE, S. W. BENT, WALLACE BENT and CORBETT BENNETT,

Petitioners,

vs.

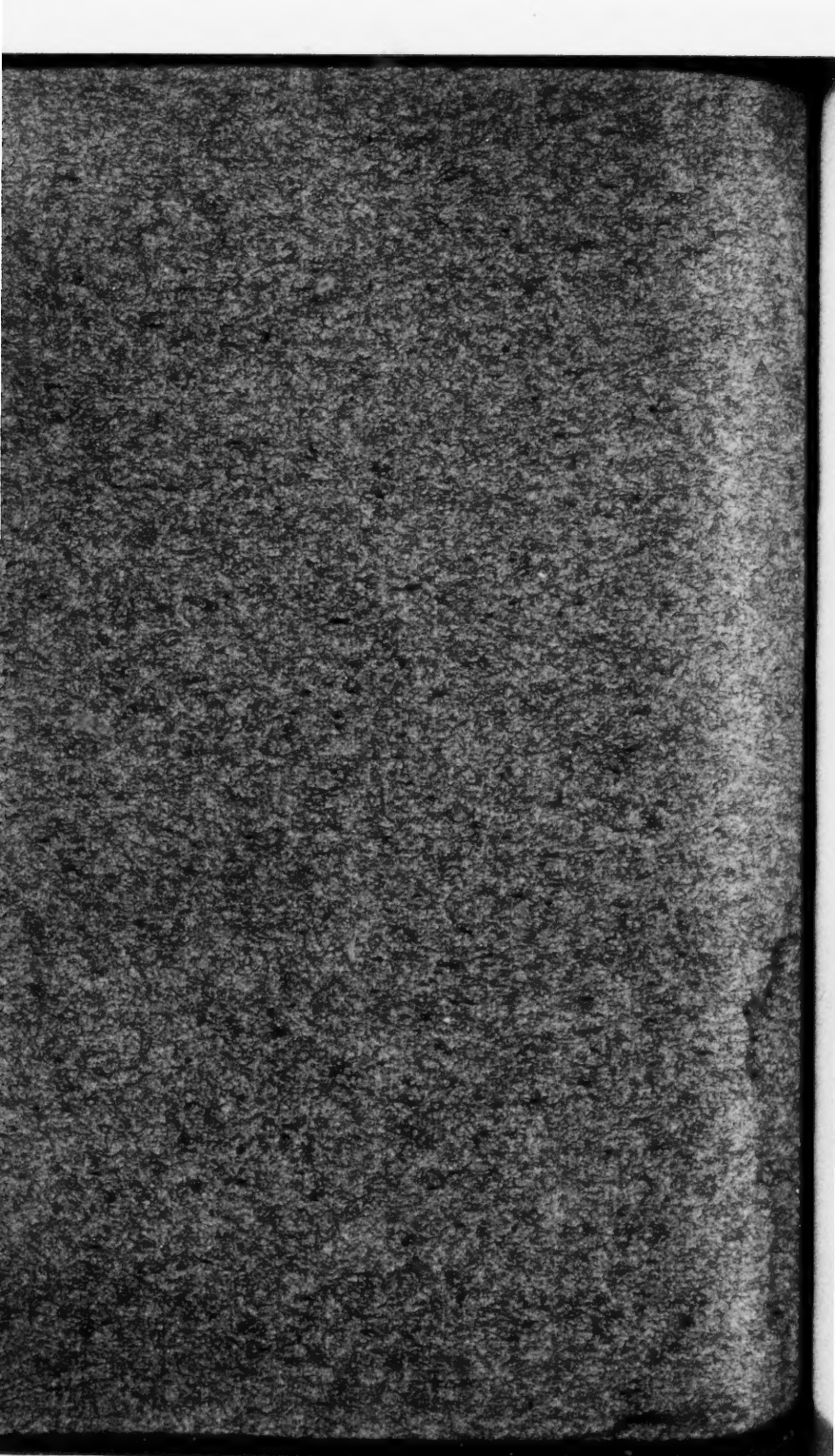
W. A. MORRIS and T. E. HOWELL,

Respondents.

BRIEF OF PETITIONERS.

GEORGE W. PIERSON,
THOMAS J. WALSH,
CORNELIUS B. NOLAN,
Solicitors for Petitioners.

THOMAS J. WALSH,
Of Counsel.



No. 122.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1910.

J. N. BEAN, W. R. BAINBRIDGE, S. W. BENT, WALLACE BENT and CORBETT BENNETT,

Petitioners,

vs.

W. A. MORRIS and T. N. HOWELL,

Respondents.

BRIEF OF PETITIONERS.

I.

STATEMENT OF CASE.

This cause is here by virtue of a writ of certiorari addressed to the Circuit Court of Appeals of the Ninth Circuit, to review a judgment of that court affirming a decree of the United States Circuit Court for the District of Montana. The suit in which the decree was entered was brought by the respondent William Morris, a citizen of the State of Wyoming, against the petitioners and others, citizens of the State of Montana, the bill of complaint alleging that the complainant is the owner

of certain lands in the state of his residence and of the right to 250 inches of the waters of Sage Creek for the irrigation of the same, appropriated in the State of Wyoming. He then averred that the defendants named in his bill were diverting, within the State of Montana, within which state the stream named has its source, and in which are its upper courses, the waters thereof and of the tributaries to and upon lands owned by them in the State of Montana, thus depriving him of the use of the same to his damage.

The bill contained an averment to the effect that "the amount in this action exceeds the sum of two thousand dollars, exclusive of interest and costs."

Record, page 2.

But it also averred that the complainant's "water right and appropriation is of the value of two thousand dollars."

Record, page 3.

In another paragraph it was averred that the complainant had suffered damages by the acts complained of in the sum of $2500,

Record, page 4,

and though the bill averred that the complainant "is entitled to damages" in the sum of $2000, no prayer was made for any judgment for damages, the relief asked being injunction against the continued diversion of the waters of the stream.

Record, page 4.

In the answer of the petitioners it was denied that the amount involved in the action exceeded $2000, or that the complainant's alleged water right was of the value of $2000, or that he had been damaged at all by any acts of the petitioners. They averred that his ditch

would not carry more than 100 inches of water, that he never farmed more than 65 acres of the land mentioned in the bill of complaint, that he had not tilled any of it more than eight years though the bill alleged that he had farmed it for fifteen years, and that no more than forty inches, as measured by the laws of Montana, were required to supply his wants. It was denied that he had made any appropriation in accordance with the laws of either Wyoming or Montana; likewise that he had used the water continuously. On the contrary the petitioners set out that they had severally made appropriations of the waters of Sage Creek and a tributary, Piney Creek, in Montana, for the irrigation of homesteads on which they had respectively settled, and which they were cultivating within that state of which they were citizens; that they had, since the date of their appropriations and for a time longer than the period of the statute of limitations (ten years) in the case of the petitioners Corbett Bennett, S. W. Bent and Wallace Bent, continuously and adversely used the waters of the stream in question for the irrigation of their places, and that relying on their right to use the water, they had placed them under cultivation, and had erected on them valuable improvements, houses, barns and fences, all of which would become valueless if they were deprived of the use of the waters of Sage Creek. They also set out that owing to the character of the bed of the stream above the head of the complainant's ditch, the water flowing therein, though allowed to run freely down the channel, would not reach the lands of the complainant in the dry season, but would lose itself in the sands of the bed. The answer set up the statute of limitations, non-user, abandonment, adverse user, laches and estoppel.

The settlement of Corbett Bennett antedated the survey of his lands, dating, with his appropriation, back to 1892. Similar conditions were averred to exist as to the predecessors of the petitioners, S. W. Bent and Wallace Bent.

Record, pages 11-19.

Before the cause came on for hearing the respondent T. N. Howell was admitted as an intervener, upon a petition alleging that he is a citizen of the State of Wyoming; that he owns lands in that state and a water right acquired by appropriation therein of 6¼ cubic feet per second of the value of $5000, subject, however, to the prior right of the complainant, and making averments as to interference with his right, substantially as did the complainant.

Record, pages 27-31.

The petitioners made answer to the intervener in substance the same as the answer filed by them to the bill,

Record, pages 35-47,

and in particular denied the intervener's allegation of residence in Wyoming, averring, in that connection, that he is, in fact, a citizen and resident of Montana.

Replications were filed and the cause proceeded, the complainant and the intervener joining in the prosecution of the suit against the defendants. Fred H. Hathhorn, solicitor for the complainant, filed the bill on his behalf,

Record, page 5,

and James R. Goss signed the petition in intervention as solicitor for Howell, intervener,

Record, page 31,

but these two parties joined in the taking and presentation of the testimony, Messrs. McConnell & McConnell

and James R. Goss acting as solicitors for both of them.

Record, pages 82, 86, 97, 100, 111, 293, 321.

After the admission of Howell as a party, the cause proceeded as though he had united originally with the complainant in the institution of the suit. In all the proceedings for the review of the judgment the complainant and the intervener have acted jointly, appearing by Messrs. McConnell & McConnell as their solicitors and counsel.

The cause, on stipulation of the parties, was referred to a master to take the testimony and make findings of fact and conclusions of law.

Record, page 293.

The master reported, among other things, that the complainant had never complied with the requirements of the laws of the State of Wyoming governing the appropriation of water or the acquisition of water rights therein.

Record, page 57.

Exceptions were taken to his report, and the findings generally approved, except that last above referred to, the court holding that complainant had made a valid appropriation.

The findings as adopted by the court were, briefly reviewed, to the effect that Sage Creek is a natural water course, having its source in the Pryor Mountains, in Carbon County, Montana, and flowing in a general southerly direction across the boundary line into Wyoming, where it empties into the Stinking Water; that in the year 1887 the complainant Morris made an appropriation in Wyoming of the waters of Sage Creek, to the extent of 100 inches, for the irrigation of a tract of 160 acres of land in that state, which he has since pre-

served by continuous use; that the right so acquired by him is of the value of $3200, and that he has been damaged in the sum of $2500 by the acts of the defendants complained of, though the evidence not segregating the damage done by any particular defendant, the court held that only nominal damages could be recovered.

Record, pages 73-76.

As to the intervener, Howell, the court made similar findings, awarding him 110 inches of water under an appropriation found to have been made in August, 1890, his right being determined to be of the value of $3200, and his damages $2500, though, for like reasons, the court held he could recover only nominal damages.

A finding was made by the court to the effect that the complainant Morris was at the time of the commencement of the suit a citizen of Wyoming,

Record, page 74,

and another, that all the defendants are citizens of Montana,

Record, page 78,

but no finding was made as to the citizenship of the intervener, the court reaching the conclusion that his citizenship is immaterial.

Record, page 79.

On these findings, a decree was entered adjudging the complainant to be the owner of 100 inches of the waters of Sage Creek, miner's measurement, his right to date from April, 1887, and the intervener to be the owner of 110 inches, dating from August, 1890. The decree enjoined the defendants from taking water from the stream in quantity sufficient to interfere with the enjoyment by the complainant and the intervener of the rights awarded them, and the complainant was enjoined

from diverting any of the water of the stream in excess of the quantity awarded him, to the injury of the intervener.

Record, pages 80-81.

From this decree an appeal was taken to the Circuit Court of Appeals, resulting in its affirmance.

Record, page 329.

These proceedings are brought to review the judgment of that court.

That part of Montana within which are the lands of the petitioners and the head waters of Sage Creek was, at the time of the appropriations found to have been made by the complainant and the intervener and, until the cession in 1892, a portion of the Crow Indian Reservation,

Record, page 205,

which extended south to the Montana-Wyoming line.

Revision of Indian Treaties, pages 327-328.

EXTENT OF COMPLAINANT'S RIGHT.

The testimony touching the extent of the complainant's water right is important.

The complainant testified to having taken out his ditch; that he kept on increasing his irrigated area until he had, "four or five years ago" (that is by the year 1900 or 1901) 100 acres of alfalfa and grain in cultivation; that his ditch covers 120 acres and that he irrigates 160 acres with it.

Record, pages 110-126.

Passing the contradictions of this statement the evidence is overwhelming that he has never irrigated, at

any time, more than 25 acres. Although many witnesses were called he is not corroborated as to the extent of his irrigated area by any of them. Even the surveyor called by the plaintiff did not commit himself on this point, simply saying that complainant's land *could* be watered by his ditch with laterals constructed from it, and that he saw evidences of irrigation on the place,—the extent of which he significantly omits to say.

Record, pages 91, 96.

On the other hand, the witness Hine made an actual survey of the land under the ditch and found it to be 21 acres and 43 rods, with a small garden patch, in all estimated by him to contain 22 to 23 acres.

Record, pages 189-190.

There is nothing to show that any more of the land has ever been irrigated, except that the witness Godfrey testified that in 1889 complainant had 40 acres under cultivation, and that this increased, but he could not say how much.

Record, pages 145-146.

The witness Martin testified that he thought that the Morris ranch was irrigated in 1899, but he did not say how much.

Record, page 181.

The witness Medhurst testified that only three acres were irrigated in 1885, before Morris came; that there was very little water from '83 to '85, and that the place could not be irrigated to any great extent, because very little water would reach the place.

Record, page 185.

The witness Bean says that 25 acres were under cultivation, and the witness Bennett, both of whom assisted Mr. Hine in making the survey of the Morris place, esti-

mated the amount under cultivation as 20 to 25 acres, with the addition of a small garden. The rest of the 160 acres had not been cultivated, and were covered with grease wood, from a foot high to as high as a person's head; that there are sand dunes there, and it showed no sign of ever having been cultivated.

Record, pages 215, 216.

The witness S. W. Bent stated that perhaps 60 acres might be irrigated, out of the 160, but that only 20 to 25 had actually been irrigated, and that the rest was covered with sage brush.

Record, page 22.

Wallace Bent also testified that that part of Morris' land lying west of the creek has never been cultivated, and is covered only with grease wood and sage brush.

Record, page 230.

CITIZENSHIP OF INTERVENER.

The only testimony in the record touching the citizenship of the intervener Howell is to the effect that at the time his testimony was taken he resided in Billings, Montana, and that he once lived in Fremont County, Wyoming.

Record, page 127.

No attempt was made to show that at the time of filing his petition or at any time since, he resided in Wyoming. The court significantly failed to make any findings as to his citizenship, remarking that jurisdiction depends not on his but the complainant's citizenship.

THE NOTICES OF APPROPRIATION OF RE-

SPONDENTS.

In support of the complainant's right he offered in evidence a statement with endorsements as follows:

"Plaintiff's Exhibit 'T.'

"In the District Court, Second Judicial District, in and for Johnson County, Wyoming Territory.

State of Claim to Water Right.

Under Chapter 61, Session Laws of 1886, Irrigation, "An act to Regulate the use of Water for Irrigation and for other purposes, and providing for Priority of Rights Thereto."

By William A. Morris, of the County of Johnson.

Territory of Wyoming.

Owner of the Sage Creek Water Right.

Territory of Montana,

County of Yellowstone,—ss.

William A. Morris, being first duly sworn, according to law, do depose and say that he is a resident of and is located in Johnson County, Wyoming Territory, and he makes his statement of claim to Water Right for the purpose of securing the right to the water of Sage Creek in the said County and Territory heretofore appropriated by him, and for said purpose I do depose and say: The name of said claimant for which said appropriation is claimed is William A. Morris. The name of the owner of said ditch is William A. Morris. The postoffice address of the owner of said ditch Billings, Montana. The headgate of said ditch and water right is located on Sage Creek in Johnson County, Wyoming, about one mile down said creek from where said creek crosses the Wyoming and Montana line. The general course of said ditch is from about northeast to southeast. The name of the natural stream from which the said ditch draws its

supply of water is Sage Creek, a tributary of Stinkwater River, Wyoming. The length of said ditch is three miles. The width of said ditch is (3 1-2) three and 1-2 feet. The depth of said ditch is two and 1-2 feet. The grade of said ditch is 50 feet per mile. The water of said stream was appropriated by William A. Morris, aforesaid, by means of a dam in said creek and ditch therefrom for said William A. Morris by the original construction thereof on the 5th day of May, A. D. 1887.

The amount of water claimed for said ditch is ——— cubic feet per second of time.

The present capacity of said ditch is ——— cubic feet per second of time.

The number of acres of land under said ditch and being and proposed to be irrigated therefrom is six hundred and forty acres, more or less.

W. A. Morris.

Subscribed and sworn to in my presence this 25th day of June, A. D. 1887. John McGinness,

(Notarial Seal.) Notary Public.

(Endorsed): Wm. A. Morris. No. 2804. Office of Register of Deeds. County of Johnson.

I hereby certify that the within instrument was filed in this office for record on the 2d day of July, A. D. 1887, at 5 o'clock P. M. and was duly recorded in Book "D," Misc. Rec., page 405. W. A. Evans, Register of Deeds. ....., Deputy. 28-04. Fees pd. 53. No. 666. Morris. Plaintiff's Exhibit "A" to be attached to the deposition of Wm. A. Morris. Filed Aug. 10, 190. Geo. W. Sproule, Clerk."

Transcript, pages 276 to 278.

No evidence of the filing was offered except the endorsement on the statement.

To the introduction of this statement the answering defendants objected on the ground that the same is immaterial and incompetent and does not comply with the laws of either Wyoming or Montana.

The intervener introduced as his notices of appropriation two papers as follows:

"Plaintiff's Exhibit 'B.'

"Timber Culture Ditch.

Taken out of Sage Creek a tributary of Stinking Water River, on or near SW 1-4 of the SW 1-4 of Sec. 18, T. 57 N., R. 97 W., running thence 24 degrees E. of S. 88 rods, thence 30 degrees E. of S. 32 R. thence 9 degrees S. of E. 22 R. 4 links, thence 42 degrees E. of S. 24 R. 10 links, thence 12 degrees E. of S., 8 R. thence 12 degrees E. of S. 8 R., thence 12 degrees N. of W. 16 R., thence 45 degrees S. of W. 64 R., thence 25 degrees E. of S. 120 R., thence 31 1-2 degrees E. of S. 147 R. 4 links to the north line of Sec. 30, T. 57 N., R. 97 west. Water was first run through said ditch on August the 4th, 1891.

(Morris vs. Bean et al. Plaintiff's Exhibit 'B,' H. L. W.)"

"Plaintiff's Exhibit B-2.

The State of Wyoming,
Fremont County.—ss.

This certifies that Josiah Cook, Esq., was a duly elected and fully qualified justice of the peace in and for said county in said state, from the first Monday in January, 1891, to the first Monday in Jany., 1893, that all official acts done by him within said dates is entitled in full faith and credence.

In witness whereof, I have hereunto set my official signature, attested by my official seal, the seal of said county this Nov. 15th, 1893. J. A. McAvoy.

County Clerk and the proper certifying officer under the laws of Wyoming to the official capacity of Notaries and Justices of the Peace.

(SEAL) J. A. McAVOY,
County Clerk.

(Plaintiff's Exhibit B-2. H. L. W.)"

"Plaintiff's Exhibit B-3.

Statement of Claim to Water Right.

By T. N. Howell, Owner of the Timber Culture Ditch.

Territory of Wyoming.

County of Fremont.—ss.

I, T. N. Howell, being first duly sworn, do depose and say that I am the owner of the above-named ditch, situated in Water District No. 8, Fremont County, Wyowing Territory, and I make this statement for the purpose of securing the right to the water of Sage Creek heretofore appropriated by me and the right of way for said ditch on the line shown by the accompanying———

1. The name of said ditch is Timber Culture.

2. The name of the owner of said ditch is T. N. Howell.

2. The postoffice address of the owner of said ditch is Lovell, Wyoming.

4. The headgate of said ditch is located on the SW 1-4 of the SW 1-4 of Sec. 18, T. 57 N., R. 97 W.

5. The general course of said ditch is SE, and the line of said ditch is more particularly shown by the accompanying ———.

6. The name of the natural stream from which said ditch draws its supply of water is Sage Creek, a tributary of Stinking Water River.

7. The length of said ditch is one and one-half miles.

8. The width of said ditch is 8 feet at the top and six

feet at the bottom.

9. The depth of said ditch is one foot.

10. The grade of said ditch is one-fourth inch to the rod.

11. The carrying capacity of said ditch is ———cubic feet per second of time.

12. Work was commenced on said ditch August 1st, 1890.

13. Water was appropriated from said ditch for NE. 1-4 of the SE. 1-4 and the SE. 1-4 of the NE. 1-4, and W. 1-2 of the NE. 1-4, S. 30, T. 57 N., R. 97 W.

14. The number of acres of land lying under and being and proposed to be irrigated by water therefrom is 160 acres.

T. N. HOWELL.

Sworn to and subscribed before me this 7th day of Sep., 1891.

JOSIAH COOK,
Justice of the Peace.

(Plaintiff's Exhibit "B-3." H. L. W.)

(Endorsed): Stat. Claim to W. Right by T. N. Howell, taking water from Sage Creek, a tributary of Stinking Water River.

State of Wyoming,
Fremont Co. Clerk's Office.—No. 5184.

Filed in this office for record at 10 o'clock A. M. Oct. 28, 1891, and recorded in Book A. of W. R. in the office of the State Engineer at pages 130 and 131, Miscellaneous Records.

J. A. McAVOY,
County Clerk and Reg. Deeds.

Recorded by State Engineer for Clk. Fremont Co. Wyo. Fees paid.

(Plaintiff's Exhibit "B" to Deposition of T. N. Howell.)"

Transcript, pages 303 to 307.

It seems to have been conceded below that neither the one nor the other of these statements met the requirements of the law of Wyoming at the time the appropriations of those parties respectively were made.

According to the testimony of the intervener, the respondent Howell, he commenced work on his ditch in August, 1890,

Record, page 128,

but did not use any water through it until the next year.

Record, page 135.

The notice which he filed states that water was first run through the ditch August 4, 1891.

Record, page 139.

In this connection it is to be noted that no evidence was submitted as to the ownership of the land at the point of diversion in the case of the appropriation of either of the respondents.

LACHES, ABANDONMENT, NON-USER AND STATUTE OF LIMITATIONS.

The intervenor testifies that he cultivated his land in 1891 and 1892, and raised a splendid crop in 1893; that he put in a big crop in 1894, but that the defendants took the water in June, and the crop dried up. He put in another crop in 1895, but that dried up also, for the same reason, and he raised nothing. He met with the same experience in 1896. Subsequent to that time he never put in any crop. He says, "I had lost three crops,

and I got disgusted with it; it was no use to try it, until I got the water right."

Record, pages 129-131.

His complaint in intervention was filed September 5, 1903.

Record, page 32.

He suffered for want of water even in 1893. On cross-examination he says, "They (the defendants) used water late in the fall of 1893; we run short of water then; I know that, in '93 I saw we were not going to have water enough to cut the oats and I cut it for hay; I would have had to irrigate it again to make oats and we didn't have the water to do it with."

Record, page 137.

The witness Godfrey, called by complainant and intervener, testified that there has not been enough water at the place of either of those parties with which to irrigate since 1893.

Record, page 145.

Another witness called by the same parties, Mr. English, tells that he was at the Howell ranch in the fall of 1893 and that everything was dried up,—no water there. —there was a little at Morris' but not much.

Record, page 154.

The intervener, Howell, called on behalf of the complainant, says the latter had not raised any crops for five or six years, because he has had no water, and that he has been unable to raise any grain since 1894 for want of water: that since 1895 the water begins to fail about June 1, and by July 1 he is out of water for irrigation, and by August even for stock.

Record, page 136.

The complainant himself says that he has been short of

water by reason of its having been taken by defendants ever since 1894.

Record, page 121.

On behalf of the defendants, the witness Hine tells that the head-gate of the Howell ditch is covered up with dirt in the creek bank, filled to the top. He says, "I observed Mr. Howell's land as to showing evidence of cultivation; it showed nothing more than just where the laterals—the laterals are ploughed out, and outside of that there is no evidence of any cultivation being there. The laterals do not show evidence of carrying water at any time. They seem to be just the same as when they were made; the appearance of the land is similar to that above the place, the same as outside of the fence. There isn't any of it that has got any grass on it, or anything to show that anything has been raised on it."

Record, page 190.

It doesn't show that it has ever been irrigated; there is no grass or anything to show it has been irrigated.

Record, page 196.

The defendant Bean says of the place, "I visited Mr. Howell's place, he has something like 100 acres under ditch; I couldn't tell that it had ever been cultivated. I didn't see anything to indicate that a crop had ever been sown on it only there was some furrows ploughed through but it didn't show that there had been any water in them, or had been any crop there; these furrows were some laterals ploughed through the field."

Record, page 207.

The defendant Corbett Bennett says, "I went to Mr. Howell's place at this time. His head gate was made of two inch stuff completely covered over, and the opening next to the creek was two feet long by five and one-half

inches deep. The opening on the ditch side was filled up with rubbish and stuff that had drifted in there and filled it in. We passed over Howell's land; so far as looking at the ground now is concerned, it shows no evidence of ever having been cultivated, he had ditches leading on the land, they showed they had never been used since they were built. Howell had no dam at all in Sage Creek, two posts set on each side of the creek, and some boards put across, evident to back up the water, but they were gone, there had at one time been in, I should judge, a temporary dam."

Record, pages 215-216.

ESTOPPEL.

In connection with the foregoing facts should be considered the undisputed testimony that the lands of all the parties are unproductive, and well nigh valueless without irrigation; that each of the appealing defendants has taken out ditches from either Sage Creek or Piney Creek, and completed their appropriations according to the laws of the State of Montana, that of Bean dating from July 1, 1893,

Record, page 247.

Bainbridge's from August, 1900,

Record, pages 237, 239, 240, 241, 236,

Bert Bent and Wallace Bent from some time in the month of October, 1892, after the 20th,

Record, pages 166, 84, 251, 253-254, 258-262,

and Corbett Bennett from July 3, 1893,

Record, pages 256-260, 248, 102-105; 227-233;

that Bean irrigates 60 acres of alfalfa, timothy, grain,

potatoes, garden and orchard on his place, the orchard consisting of five acres of apples, pear and plum trees.

Record, pages 243, 246;

and that he has on the place other improvements consisting of ditches, fences, corrals, barns and houses of the value of $2000,

Record, pages 243-248,

that Bainbridge cultivates 30 acres of alfalfa, grain and potatoes, and has improvements on his place, consisting of a house, barns and sheep and horse corrals worth $1500,

Record, pages 241-242, 236,

that Bert Bent has 150 acres in crop mostly wild hay with some alfalfa and grain; that he has on his place improvements consisting of fence, corrals, sheep sheds, stables, etc., of the value of $2500,

Record, pages 252-253, 269-270,

that Wallace Bent has 110 acres in crop, timothy, alfalfa, wild grass, grain and potatoes; that he has on his place improvements similar to his brother's worth $2000,

Record, pages 252, 253, 262,

and that Corbett Bennett irrigates 30 acres of timothy and alfalfa and has similar improvements on his place worth $2000.

Record, pages 249-250.

SINKING OF WATER IN SAGE CREEK.

A large amount of testimony was submitted on the one side to establish, and the other to refute the contention that in the season of low water the amount of the flow of Sage Creek is so small as that if allowed to run

it would sink in the sands and be unavailable to the complainant or intervener at their respective places.

It appears by the uncontradicted evidence that Sage Creek is a slow stream, very crooked, the bed of which consists of sand or gravel, and that it is about forty miles, following its sinuous course, from the vicinity of the lands of the petitioners to those of the respondent Morris,

Record, pages 192, 214,

and twelve miles more to Howell's.

Record, page 205.

Inasmuch, however, as this feature of the case had the earnest consideration of the trial and the reviewing court, the evidence is not here summarized, nor is the court asked to enter upon the inquiry.

The petitioners, however, ask a review of the record under the following:

II.

SPECIFICATIONS OF ERROR.

I.

It was error in the Court to find or rule that any appropriation made by the complainant or the intervener of the waters of a stream in the State of Wyoming gave to them, or either of them, any priority over any right acquired by the petitioners or any of the defendants, under or by virtue of the laws of the State of Montana, or to the waters of any stream within the State of Montana.

II.

It was error in the Court to find or rule that any appropriation made by the complainant or the intervener of any water within the State of Wyoming, or made under the laws of Wyoming, or any right to the use of the water of any stream in the said State of Wyoming, or

acquired under the laws of Wyoming, or any right to the use of the water of any stream in the said State of Wyoming, or acquired under its laws, furnished any basis before any court sitting in the State of Montana for an injunction against the petitioners, having appropriated and acquired the right to the use of the waters being used by them within the State of Montana, under and by virtue of the laws of the State of Montana.

III.

It was error in the Court to find or rule that the Court had any jurisdiction to enforce, as against citizens of the State of Montana using waters within the State of Montana, of streams within the State of Montana, appropriated under its laws, rights claimed to have been acquired by the respondents to the use in the State of Wyoming of the waters of a stream within the State of Wyoming, acquired under and by virtue of the laws of the State of Wyoming.

IV.

It was error in the Court to hold that the amount in controversy between respondent Morris and petitioners exceeded $2000.00, or that the court upon the averments of the bill or under the proofs had any jurisdiction of the subject-matter, and it was error to enter any decree herein, for that it appears from the bill of complaint that the amount in controversy does not exceed $2000, and that, therefore, the Circuit Court had no jurisdiction of the subject-matter of the action.

V.

It was error in the Court not to dismiss the petition of the respondent Howell, and it was error to grant him any relief, for that it appears that the Court had not jurisdiction of the subject matter of his petition or to grant him

any relief, because he has not shown that he is or was at any time a citizen of any state other than the State of Montana, of which the petitioners against whom he seeks and was granted relief are citizens.

VI.

It was error to grant any relief to the respondent Morris, for that the said respondent consenting to the respondent Howell's joining with him in the prosecution of this suit against the petitioners, the respondent Howell appearing to be a citizen of the same state with petitioners, the Court lost jurisdiction and had no power to enter any decree except one of dismissal.

VII.

It was error in the Court to find or rule that any acts of the respondents in the State of Wyoming, while the lands now owned by the petitioners were a part of the Crow Indian Reservation, gave to the said respondents any priority of right to the waters of Sage Creek as against the rights of Indians to the waters of the streams within the said reservation, or as against any person acquiring any of said lands through which any streams of the said reservation might flow, and particularly as against the petitioners acquiring lands within what was the said Crow Indian Reservation, at the time of the alleged appropriations of the said respondents on the opening of said reservation, through which flowed the streams, from making use of the waters of which the decree entered herein enjoins the petitioners.

VIII.

It was error in the Court to hold that any acts of the respondents towards the appropriations of the waters of any stream in the State of Wyoming gave to them any rights as against occupants of lands

within what was formerly the Crow Indian Reservation, as to streams flowing through the same, antedating the time when such lands ceased to be a part of said Crow Indian Reservation.

IX.

It was error in the Court to find that the cause of action of either of the respondents is not barred by the Statute of Limitations.

X.

It was error in the Court to find that either of the respondents is not guilty of such laches as to defeat his right to maintain this action.

XI.

It was error in the Court to find that either of the respondents is not estopped from maintaining this action.

XII.

It was error in the Court to find that either of the respondents has not abandoned any right he ever acquired as against the petitioners to the waters of Sage Creek.

XIII.

It was error in the Court to find or rule that the waters of said Creek, during the irrigating season do not sink in the channel thereof, above the land of either of the respondents, or that a useful quantity of the same would reach the lands of the respondents during the irrigating season, but for the diversion of the same and its tributaries by the petitioners, and to fail to find and rule that the waters of said Creek, during the irrigating season, sink in its bed or channel, so that, though the petitioners diverted none of the same or the waters of the tributaries of the said Sage Creek, a useful quantity thereof would not reach the lands of either of the respondents.

XIV.

It was error in the Court to find that the respondent Morris is entitled to, or to judge to him, more than twenty-five inches, miners' measurement, of water.

XV.

It was error in the Court to award to either of the respondents any number of inches, "miner's measurement" for that in his bill respondent Morris alleges an appropriation of two hundred and fifty inches "statutory measurement," and respondent Howell six and one-fourth cubic feet per second, neither alleging an appropriation of any number of inches "miner's measurement."

XVI.

It was error in the Court to award to either of the respondents any quantity of water measured by miner's inches, for that the standard for the measurement of water in the State of Wyoming is a cubic foot of water per second, and because a miner's inch is an uncertain and indeterminate quantity.

XVII.

It was error in the Court to hold that respondent Howell acquired a water right, notwithstanding he failed to comply with the laws of Wyoming by filing an application, and obtaining a permit, as required by Section 34 of the Act of the Legislative Assembly of the State of Wyoming, approved December 22nd, 1890.

XVIII.

It was error in the Court to hold it unnecessary for the respondents to make proof that their appropriations, respectively, were made either on the public domain or on private lands, with the consent of the owner of such lands.

XIX.

It was error in the court to hold that the amount in controversy exceeded $2,000.00.

III.

ARGUMENT.

I.

THE JURISDICTION OF THE CIRCUIT COURT.

The petitioners insist that the decree is erroneous and should be reversed, because

(a) The amount in controversy as shown by the bill of complaint does not exceed $2000, exclusive of interest and costs.

(b) There is no diversity of citizenship shown by the proof between the respondent Howell and the defendants against whom he prayed and obtained relief.

(a) THE AMOUNT IN CONTROVERSY.

The bill alleges that the amount in controversy exceeds $2000, exclusive of interest and costs, but whether it does or does not is to be determined from the facts stated. If the just conclusion from those facts is at variance with the mere conclusion of law which the averment referred to,

Fishback v. W. U. Tel. Co., 161 U. S. 96,

it can have no weight. The thing in controversy, as was justly said by the learned district judge, is the respondent Morris' water right. On the value of that right depends the jurisdiction of the court. That right is averred in the bill to be of the value of $2000.

Record, page 3.

Of course, a controversy involving a right of the value of $2000 does not fall within the jurisdiction of the United States Circuit Court. The amount involved must exceed $2000.

It is true the bill avers that the respondent Morris has been damaged in the sum of $2500 by petitioners' interferences with his water right, but damages in equity can be awarded only as incidental to the main relief. The jurisdiction to award damages is at best a *dependent* jurisdiction. If the court of equity has no jurisdiction over that feature of the controversy, by reason of which alone it is entitled to hear the cause, because the value of the litigated right is not sufficiently large, its jurisdiction cannot be helped out by the amount of damages claimed in consequence of an invasion of that right.

But more. The damages that might be awarded could not by any possibility exceed the value of the property right injured. One cannot recover damages for injury to property in excess of its value.

Lentz vs. Carnegie, 27 Am. St. Rep. 717.

If the respondent Morris were, by proceedings in eminent domain, deprived for all time of his water right his damages, conceding its value as averred in his bill, would be just $2000. It is apparent, then, that that is the amount in controversy. Accordingly, we insist that the bill shows on its face that the court has no jurisdiction and we submit that the evidence confirms the want of jurisdiction disclosed by the bill.

Undoubtedly in actions "sounding in damages" the amount claimed as damages controls. But this is not an action sounding in damages. It is an action in equity for an injunction, damages being asked as merely incidental relief. It is more nearly like an action to quiet title in which the value of the property is the test.

Simon vs. House, 46 Fed. 317;

Smith vs. Adams, 130 U. S. 167.

"In determining from the face of a pleading

whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. Barray v. Edmunds, 116 U. S. 550, 560; Wilson v. Danier, 3 U. S. 3 Dall. 401, 407."

Vance vs. Vandercook, 170 U. S. 468-472.

"Value Distinguished from Amount—Property Rights Involved.—Where property itself or its title is in litigation, or some question *per se* affecting its enjoyment and possession, its value is the real matter in controversy, as distinguished from the claims of the contending parties."

1 Ency. Pl. & Pr., 726.

Besides no case is made by the bill, or by the proof, for that matter, for the recovery of damages, even conceding that in an action to restrain trespasses or enjoin a nuisance damages for past injuries resulting from the wrongs complained of can be recovered. The court from which this cause comes holds that equity has no jurisdiction to grant any such relief in an action of that character.

Norton v. Colusa Parrot M. & S. Co., 167 Fed. 202.

But it is undeniable that there can be no joint recovery of damages against a number of parties diverting water from a stream unless they act jointly in the diversion. If each acts separately or if any one acts without the consent of the others, he is responsible only for the damage which he occasions; not for any that may arise by their acts.

The bill simply charges an aggregate damage by the acts of all the defendants in the sum of $2500, and conse-

quently states no cause of action for the recovery of any sum from any defendant. And no effort was made in the proof to show what damage, if any, was done by any particular defendant. Wherefore, the court refused to award any damages and the decree grants the equitable relief of injunction only.

It is true the learned trial judge said in the opinion filed by him that by reason of the state of the proof as adverted to the complainant could have nominal damages only. But nominal damages are as unjustifiable as substantial damages. There is no justification for awarding a judgment for damages in the sum of one dollar against all or any of the defendants any more than there is of $2500.

He recognized that the claim for damages in the bill afforded no basis for the jurisdiction of the court that the value of the complainant's water right was what controlled, and that the averment of the bill in that regard was insufficient to confer jurisdiction on the court. He suggested an amendment to make the pleading conform to the proof in that regard.

Record, page 302.

But no application to amend was ever made nor was any order ever entered.

It is elementary that in a suit in equity originally begun in the United States Circuit Court the bill must disclose a case within the jurisdiction of the court.

Metcalf v. City of Watertown, 128 U. S. 586.

"When it is properly before the court the bill will be examined as required by the act of congress, 1888, and if the jurisdictional facts do not affirmatively appear in the record, the bill will be dismissed."

Bates Fed. Rep. Proc. 11.

It is most respectfully insisted that the proof elsewhere herein reviewed shows to demonstration and without substantial conflict that the complainant never did effect an appropriation of more than twenty-five inches of water, under any theory of the law, and that an application, had it been made to the court of first instance, to amend by averring such right to be of a value in excess of $2000 ought to be denied as palpably contrary to the facts as established by the evidence. The bill shows a want of jurisdiction in the court over the subject matter for which reason the judgment must be reversed.

It need not be said that the finding of the court to the effect that the complainant's water right is of the value of $3200 (made on a basis of a right of 100 inches) is of no avail to support the decree. Whatever the proof or findings may be, the decree must be supported by the pleadings, or it cannot stand.

(b) THE CITIZENSHIP OF THE INTERVENER.

It is conceded that the intervener, Howell, is a citizen of Montana. He resides at Billings, in that state. No attempt was made to show that at the time of filing his petition, or at any time since, he resided in Wyoming.

The decree, so far as it awards him any rights, cannot stand. It is sought to justify it on the ground that the jurisdiction of the court being invoked by complainant Morris, Howell had a right to intervene, and have his rights adjudicated, even though he should be a citizen of Montana.

This was the view taken by both the master and the trial judge.

Record, pages 79, 60.

To this proposition we most respectfully dissent. It is conceded that when, by virtue of any action, property

is brought before the Federal Court of Chancery, which is to be disposed of in the action, any person claiming an interest in the property may be made a party without regard to citizenship. Thus, in an action to foreclose a mortgage, judgment creditors or holders of mechanics' lien may be admitted as parties, for the purpose of establishing their rights, without reference to their citizenship.

Lilenthal vs. McCormick, 117 Fed. 89.

So in admiralty, which usually proceeds *in rem*, any one claiming a lien upon, or interest in the property in litigation, may come in.

It is plain from

Rouse vs. Letcher, 156 U. S. 47,

that to warrant an intervention without respect to the citizenship of the intervener, the property that is the subject of the action must be *in custodia legis*. But there is no property before the Court in this case. There can be none. The property which was made the subject of the bill of complaint—complainant Morris' water right—is not in Montana, but in Wyoming, beyond the jurisdiction of the court. The jurisdiction to proceed at all in this case can be maintained only on the theory that it is a purely personal action.

The Circuit Court for the District of Montana cannot adjudicate on water rights in the State of Wyoming.

Conant vs. Deep Creek Co., 66 Pac. 188.

But, finding within its jurisdiction one who threatens to do the complainant a wrong with reference to property beyond its jurisdiction, a court of equity will bring his person before it, and restrain him from doing that wrong. This case proceeds upon the theory of

Penn vs. Lord Baltimore, 1 Ves. 444, and

Massey vs. Watts, 6 Cranch. 148.

(See Notes to Penn vs. Lord Baltimore, in II. Leading Cases in Equity, 1817)

namely, that it is a personal action.

The appearance here of the intervener can offer no jurisdiction on the court over any controversy between him and these defendants.

> "The Circuit Court cannot take jurisdiction of an intervention in a merely personal action in which no fund has come into the possession of the Court by one who is a citizen of the same state as the party against whom his complaint is directed."

Seligman vs. City of Santa Rosa, 81 Fed. 524.

In that case Judge Morrow referred to the case of

United Electric Co. vs. La. Electric Co., 68 Fed. 673,

in which one of the propositions determined is thus expressed in the syllabus:

> "Where jurisdiction rests upon the diverse citizenship of complainant and defendant, and during the proceedings, a third party, who is a citizen of the same state with defendant, intervenes, the court will have no jurisdiction of his controversy with defendant, unless the controversy between complainant and defendant is one which draws to the court the possession and control of defendant's property, in which the intervener claims some interest."

The authorities from this and other courts declaring in general terms that an intervention may be permitted without reference to the citizenship of the intervener are reviewed by Judge Wellborn in

Newton v. Gage, 155 Fed. 598,

and are there shown to be in harmony with the rule that

> "The bringing in of a new party in a suit in a federal court by cross-bill or otherwise, when the pres-

> ence of such party as an original defendant would have defeated federal jurisdiction, violates both the constitutional and statutory requirement as to diverse citizenship, and the court is without jurisdiction to entertain a cross-bill by an intervener who could not have been made a party to the original bill, unless such intervener represents an interest already before the court or claims an interest in property of which the court holds possession."

Howell had no right to intervene in this action, and the order permitting him to do so was erroneous.

And, the complainant having voluntarily assented to his intervening, the jurisdiction of the court was destroyed.

Forest Oil Co. vs. Crawford, 101 Fed. 849.

In that case, the plaintiff, claiming an undivided interest in certain lands, brought his action to quiet his title, alleging diverse citizenship. Afterwards other citizens of the same state with the defendant were permitted to intervene, and establish with plaintiff their joint claim against the defendant. The Circuit Court of Appeals for the Third Circuit held the jurisdiction failed, saying:

> "We cannot shut our eyes to the quite apparent fact that he voluntarily assented to the irregular proceedings by which his bill, even if otherwise maintainable, was made fatally defective by the misjoinder therein of others as his co-plaintiffs. He seems to have been entirely satisfied to have the interposing parties united with himself, to assert with them a joint claim, and to recover with them a joint judgment; and he should not, we think, be now relieved from the consequences of his association."

Forest Oil Co. vs. Crawford, 101 Fed. 852.

Although this is not a joint judgment, nor do the intervener and complainant prosecute a joint claim, still had they united in the first instance, as they might very properly have done, to assert jointly their several claims and to obtain a judgment requiring the defendants to allow to flow down the stream the sum of 110 inches and 100 inches of water, there could be no doubt that the court would be powerless to proceed for want of jurisdiction.

The court very properly held that it had no jurisdiction to adjudicate the rights of the defendants as against each other,

Record, page 79.

But unless the intervener is a citizen of some state other than Montana, it had as much right to do so as it has to adjudicate the rights of the intervener as against the defendants. The ruling which was made amounts to this—that had the complainant made Howell a defendant, and had Howell in his answer or in a cross-bill asserted his rights against all the other defendants, as he has done in his petition in intervention, the Court could not adjudicate them; but since he comes in as an intervener, it may. Or had the complainant omitted to make one of the defendants parties, he might intervene, and get a decree adjudicating his rights, as against all the defendants, relief denied to him by reason of the fact that he is a citizen of the same state with the other defendants.

No authority is necessary to establish that when a fund is in court, even in a Federal Court, the parties are made defendants who claim an interest in it, their rights as against each other are properly adjudicated in the action.

II.

ORIGIN OF A WATER RIGHT.—THE NATION OR THE STATE?

But if the jurisdiction of the court be sustained, a question of first imprtance in this case is as to whether the complainant or the intervener has any water right that he can assert in any court in Montana, seeing that the only right he claims originates by reason of his diversion in the State of Wyoming of the waters of a stream coming into that state from the State of Montana, within which state the defendants are making the diversions complained of from the same stream and its tributaries, under appropriations made pursuant to its laws.

Complainant and intervener claim to be citizens of Wyoming. Defendants against whom the decree appealed from is awarded are citizens of Montana.

The solution of the question requires an investigation of the true basis of a water right,—that is, a right to divert the water of a stream to the exhaustion of the same if necessary,—whether it originates in a grant from the general government of property belonging to the nation, or whether it is founded upon a grant from the state of a property right of which the state has the lawful disposition.

The federal courts have uniformly held that the general government owns the waters of the innavigable streams flowing over the public lands as a part or an incident of the same, that the right to appropriate the water of such streams comes from the general government and that, as a logical consequence, state lines are immaterial in the determination of relative rights.

The people of the strictly arid states, speaking through

their constitutional conventions, their legislatures and their courts, deny the claim of ownership or right of disposition on the part of the general government in the water of any streams flowing through their territory, and maintain that such waters belong to the states, respectively, with the right to say who may use and enjoy them and to prescribe the conditions under which the right to their use may be acquired.

The theory of national ownership is asserted and the decree in this case justified in

Howell v. Johnson, 89 Fed. 556, and in

Morris v. Bean, 123 Fed. 618,

in which the opinions were written by Judge Knowles of the District Court of Montana; in

Hoge v. Eaton, 135 Fed. 411,

a ruling by Judge Hallett of the District of Colorado; in

Anderson v. Bassman, 140 Fed. 14,

a decision by Judge Morrow sitting in the Circuit Court for the District of Colorado; in

Morris v. Bean, 146 Fed. 423,

in which the opinion was written by Judge Whitson, sitting at the hearing of the court of first instance in this cause; and in the two cases which have come to this court from the Circuit Court of Appeals for the Ninth Circuit,

Rickey L. & C. Co. v. Miller and Lux, 152 Fed. 11,

and the present one,

Bean v. Morris, 159 Fed. 651.

An examination of the opinions filed in these several cases will disclose that they all, save Hoge v. Eaton, rest upon the reasoning of Judge Knowles in

Howell v. Johnson, 89 Fed. 556.

That case was really the same one now before the court. The Howell mentioned in the title is the inter-

vener in this suit, and the right asserted in that action is the one decreed to him in this. He obtained a decree against Johnson and others, but the Circuit Court of Appeals held it void for uncertainty in

In re Huntley, 85 Fed. 889.

The opinions reported in 123 Fed. and 159 Fed. were filed in different stages of the present litigation. The views of Judge Knowles expressed in Howell v. Johnson were accepted by Judge Morrow in Anderson v. Bassman and Judge Hallett hardly more than expresses his conviction as to the question involved in Hoge v. Eaton, and refers to Howell v. Johnson. Though Judge Whitson gives us the benefit of some discussion of the subject in his opinion on which the decree is based,

Morris v. Bean, 146 Fed. 423,

it is evident that the earlier rulings of Judge Knowles had a preponderating influence with him, as they, of right should have, not only because they, in a sense, declared the law of the case, but because of the just fame of that learned jurist in respect particularly to those branches of the law involved in the case.

So, it may, in perfect justice be said that the Circuit Court of Appeals for the Ninth Circuit, in both of the cases coming before it, adopted the conclusion as well as the line of argument of Judge Knowles in Howell v. Johnson without adding to the discussion.

We must go back, then, to that opinion to ascertain the course of reasoning upon which rests the conclusion that a claimant of a water right in one state may go into the courts of another, in which are the head waters of the stream from which he diverts, and ask it successfully to enjoin its citizens from using the waters of that stream therein, upon the claim of a prior appropriation in the

state from which he comes.

Meeting the contention here made by the petitioners, the learned jurist who wrote the opinion in Howell v. Johnson said therein:

> "It is urged that in some way the state of Montana has some right in these waters in Sage Creek or some control over the same. It never purchased them. It never owned them. * * * In that case (St. Anthony Falls Water-Power Co. v. Board of Water Com'rs of St. Paul, 18 Sup. Ct. 157) it was not held, nor was it held in any of the cases cited in the decision therein, that the rights of the owner of the land through which any navigable stream flowed, within the boundaries of any state, depended upon the laws of such state, or that the said owners' right to such waters depended upon such laws, as against one who claimed a right to the same under the laws of congress. To so hold would uphold the view that a state might interfere with the primary disposal of the land of the national government. When a party has obtained title to property from the national government, the state government has no right to destroy that title, except under the power of eminent domain. The state of Montana cannot step in, and say, 'The right to the water of Sage creek, which the plaintiff acquired under the laws of congress, you can not exercise in this state.'"

Howell vs. Johnson, 89 Fed. 559.

The theory so advanced by the defendants was held to be groundless, at least as to non-navigable waters. Earlier in the opinion the learned judge had traced the foundation of water rights to congressional legislation, to a grant from the general government, not from the state government, his course of reasoning being shown by the following extract from the opinion.

> "The national government is the proprietor and

> owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of these lands, it has the power to sell or dispose of any estate therein or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper."
>
> Howell vs. Johnson, 89 Fed. 558.

The idea is quite clearly expressed by Judge Morrow in Anderson vs. Bassman, wherein, after referring at length to the views of Judge Knowles in Morris vs. Bean, he says:

> "It is further urged that, as the complainant had obtained his rights from the state of Wyoming by appropriating the water in accordance with its laws, his rights depended upon such laws, and were governed thereby. But the court very clearly explained that the rights of the complainant did not rest upon the laws of Wyoming, but upon the laws of Congress; that the legislative enactment of Wyoming was only a condition which brought the law of Congress into force."
>
> Anderson vs. Bassman, 140 Fed. 14.

Now the state of Wyoming denies that the right to the use of the waters of that state by appropriation rests upon any congressional grant; it denies that the waters of that state belonged to the general government except as trustee for the state, and it asserts that the state and the state alone is the fountain and source from which springs any right whatever to the use of the flowing streams within its borders.

Its views are elaborated in a number of decisions of its

highest judicial tribunal and are enforced with a wealth of learing and cogency of reasoning that would command respect, even though the respondents were not citizens of that state, and required to look to it for such rights as they may have to the waters of Sage Creek.

The opinion in the case of

Farm Investment Co. vs. Carpenter, 61 Pac. 258,

sets forth most fully, perhaps, the theory of the Wyoming court. Therein reference is made to the following provisions of the constitution of that state:

> "'Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved.' Article 1, Sec. 31. 'The waters of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.' Article 8, Sec. 1. 'There shall be constituted a board of control to be composed of the state engineer, and superintendents of the water divisions: which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and for their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state.' Id. Sec. 2. 'Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.' Id. Sec. 3. 'The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof.' Id. Sec. 4. 'There shall be a state engineer who shall be appointed by the governor of

> the state and confirmed by the senate; he shall hold his office for the term of six (6) years or until his successor shall have been appointed and shall have qualified. He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position.' Id. Sec. 5."

The provision that "The waters of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state are hereby declared to be the property of the state" is held to be merely declaratory of an existing right, as of necessity it must be. If these waters did not belong to the state, but were owned by the general government or by private individuals the recital in the Wyoming constitution would be an evident attempt at confiscation.

The court, accordingly, defends this declaration in the following language:

> "At the outset, however, it is strenuously insisted that the declaration contained in the constitution, that the waters of the natural streams, etc., are the property of the state, is meaningless and of no force and effect. It is argued that the state no more than an individual can acquire property by a mere assertion of ownership, and that the United States, as the primary owner of the soil, is also primarily possessed of title to the waters of the streams flowing across the public lands. This contention demands more than a passing notice. * * * Under the doctrine of prior appropriation, it would seem essential that the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such

waters are, we think, generally regarded as public in character. By the civil law the waters of all natural streams were publici juris, and, according to Bracton, that was the rule anciently in England. Kin Irr. Sec. 53; Gould, Waters, Sec. 6. At the modern common law, public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws, and sanctioned by the courts,—a public use sufficient to support the exercise of the power of eminent domain. Irrigation Dist. v. Bradley, 164 U. S. 112, 160, 17 Sup. Ct. 56, 41 L. Ed. 369. This use and the doctrine supporting it are founded upon the necessities growing out of natural conditions, and are absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region, and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water. The common-law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws, and decisions of courts, and the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become, perforce, publici juris. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. In a country where doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to appropriation are public,

or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however, this may be, we entertain no doubt of the power of the people in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams and other natural bodies of water to be the property of the public or of the state. Nor do we doubt that the legislature may make a like declaration, when in that particular unrestrained by the constitution. If any consent of the general government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in several enactments by congress, beginning with the act of July 26, 1866, and including the desert land act of March 3, 1877."

It invites attention to a similar legislative declaration in Arizona and Nevada and to the fact that the people of Colorado made a similar assertion through their constitution in reference to which the supreme court of that state said in

Wheeler vs. Irrigation Co., 10 Col. 582, 17 Pac. 487:

"Our constitution declares all unappropriated water in the natural streams of the state to the use of the people, the ownership thereof being vested in the public. We shall presently see that after appropriation the title to this water, save, perhaps, as to the consumer's ditch or lateral remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator."

And in

Ft. Morgan L. & C. Co. vs. South Platte Co., 18 Col. 1, 30 Pac. 1032.

"Under our constitution, the water of every natural stream in this state is deemed to be the property

of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom and apply the same to beneficial uses is, however, expressly guaranteed. By such diversion and use a priority of right to the use of the water may be acquired."

Reference is then made to the well-known decisions of the Supreme Court of the United States holding that the tide waters and the waters of navigable streams are the property of the state, a proposition assented to by Judge Knowles in Howell vs. Johnson, and the conclusion is reached that in the arid states where water, in the language of the Wyoming constitution, is "essential to industrial prosperity," the proprietorship of all waters is in "the state, as representative of the public or people."

A similar declaration as to the state's ownership of the waters within it is made in the constitution of North Dakota.

North Dakota Const., Art. 17, Sec. 210.

A most instructive consideration of this subject and the conflicting opinions of courts touching it will be found in

1 Farnham on Waters, 135 to 136a.

and in

2 Farnham on Waters, 649 to 652.

Results widely different and of great moment follow from the adoption of the one or the other theory of the origin of water rights,—whether they emanate from the state or exist by reason of a grant from the general government.

If the general government owns the water on the public domain as an incident of its ownership of the public land as asserted by Judge Knowles in Howell vs. Johnson, it may grant the right to the water separate and

apart from the land. It is argued from the premise of its ownership of the waters that the acts of 1866 and 1890 operate to convey to an appropriator title to so much of the waters of a stream as he may appropriate, but that if the government has theretofore granted to any one land bordering on or traversed by the stream, it has already granted to such person as an incident to his grant of land, riparian rights in the stream, to which the right of the subsequent appropriator is subject. If the grant of the riparian lands, by relation or otherwise, antedates the appropriation, the riparian right is paramount; if it is later, by the provisions of the acts of 1870 and 1866, it is subject to the accrued right to the water.

The views expressed by the learned Judge Knowles in reference to the proprietorship of the general government in the waters on the public domain led him in

Cruse vs. McCauley, 96 Fed. 369,

to the conclusion that a pre-emptor whose declaratory statement was filed prior to an appropriation of the waters of a stream flowing through his pre-emption claim, could assert riparian rights as against the appropriator.

This is the doctrine of

Lux vs. Haggin, 69 Cal. 255; 10 Pac. 674,

in which the rule of the civil law, adverted to in Farm Investment Company vs. Carpenter, that the title to all waters is in the public, was held not to be in force in California.

See note 10 to

1 Farnham on Waters, 136.

Oregon followed the California rule in

Curtis vs. Water Co., 20 Or. 34.

It is likewise the law of Washington.

Benton vs. Johncox, 17 Wash. 277; 49 Pac. 495.

It is asserted in recent exhaustive discussions of the subject by the supreme court of Nebraska.

Meng vs. Coffey, 93 N. W. 713;

Crawford Co. vs. Hathaway, 93 N. W. 781.

It must be the law of North Dakota in view of the decision in

Bigelow vs. Draper, 69 N. W. 570.

It will be observed, however, that all the states from which these decisions come, those of Judge Knowles alone excepted, lie about the border of the arid region. To what extent the opinions of Judge Morrow and Judge Whitson may have been influenced by the doctrine prevailing in their own states, it is, of course, impossible to know.

But when we get into the very heart of the arid region, we find the state courts uniformly refusing to give any assent to the existence of any riparian right whatever. They deny that the grantee of *land* from the government acquired any right whatever in the water flowing through it. Colorado led in the denial to the riparian owner of any rights in the waters of the stream.

Coffin vs. Left Hand Ditch Co., 6 Col. 443,

and the rule announced by it became known as the "Colorado doctrine."

Long on Irrigation 6.

in distinction from the rule of

Lux vs. Haggin,

spoken of as the "California doctrine."

Willey vs. Decker, 73 Pac. 210-214.

Although Nevada originally enforced the riparian right, it no longer recognizes it.

Union M. & M. Co. vs. Dangberg, 81 Fed. 73-94.

Arizona enforced the civil law that waters were public and subject to disposition by the legislature under the law of appropriation, in

Clough vs. Wing, 17 Pac. 453.

The supreme court of Idaho spoke of the "phantom of riparian rights" and denied the existence of such a thing in that state.

Drake vs. Earhart, 23 Pac. 541.

Utah declines to recognize their existence.

Stowell vs. Johnson, 26 Pac. 290.

New Mexico adheres to the same view.

Albuquerque vs. Gutierrez, 61 Pac. 357.

So likewise does Montana as shown by

Fitzpatrick vs. Montgomery, 20 Mont. 181-185, in the opinion in which the court said:

> "In all of the states of the union where mining has been at all extensively engaged in, especially in the northwestern states and territories, the question here presented for determination has been a fruitful source of litigation. Under the common law the owner of land through or along which a stream flowed had a right to have it flow in its natural channel, undiminished substantially in quantity, and unpolluted in quality, whether he derived any practical benefit from such stream or not. This doctrine has been departed from, if indeed, it ever was recognized as the rule of law in the gold mining states and territories of the northwestern part of the union, and especially so in the Pacific states and territories. There the right to appropriate water for mining and other useful purposes is as old as the settlement and civilization of such states and territories. The right to appropriate water on the public lands by miners and for other useful purposes was long ago recognized by congress. We think it may be safely said that the right to appropriate water for mining and

other useful purposes is settled as the law in all the mining states of the West. It is certainly the settled rule in this state. (Atchison vs. Peterson, 1 Mont. 561; Gallagher v. Zasey, 1 Mont. 457.) California, it is true, by a divided court has confined the right to make such appropriation to waters on public lands, holding that the purchaser of lands from the government takes the same with all the common-law riparian rights attached. (Lux v. Haggin, 49 Cal. 255. 10 Pac. 674.)

The Oregon Supreme Court, in Curtis v. Water Co., 20 Or. 34, 23 Pac. 808, and 25 Pac. 378, followed the rule announced by the California court. But this restriction is not recognized in Nevada or Colorado, nor in any other of the mining states or territories, that we are aware of. (Jones v. Adams, 19 Nev. 78, 6 Pac. 442; Reno Smelting, M. & R. Works v. Stevenson, 20 Nev. 269, 21 Pac. 317; Coffin v. Ditch Co., 6 Col. 443; Golden Canal Co. v. Bright, 8 Col. 144, 6 Pac. 142)."

Some confusion in opinion as to the law of Montana on this subject has arisen by reason of some remarks made by Mr. Justice Pigott in

Smith vs. Denniff, 24 Mont. 20; 60 Pac. 398.

The supreme court of Wyoming appears to have gained the impression that by this decision the Montana court is committed to the "California doctrine."

Willey vs. Decker, 73 Pac. 210.

And the author of

Long on Irrigation

is similarly in error.

It is clear from the context that the only idea the court intended to convey by the language to which has been attributed this significance is that one may not invade the possession of a riparian proprietor for the purpose

of cutting therein a ditch to effect a diversion of the water of a stream, and thus initiate an appropriation without the consent of the riparian proprietor; that both the general government and the state government have given permission to cut ditches through their lands either to initiate the right or to convey the water to the lands to be irrigated, but that permission must be first had of a private riparian proprietor.

None of the district courts of the State of Montana ever enforced the riparian right and Farnham says it does not exist in the law of that state.

3 Farnham on Waters, 652d.

The learned author last referred to invites attention to the fact that the court in the very case of Smith vs. Denniff, supra, declared that by reason of a provision of the constitution, the State of Montana "has, by necessary implication, assumed to itself the ownership *sub modo* of the rivers and streams of the state."

The views of the supreme court of Wyoming have been adverted to. With one accord the states of the arid region deny that the grantee of land from the government gets any right to the waters flowing through or along it, and assert that such waters belong to and remain in the state; that the state has the right to say and does say whether those waters shall be enjoyed by the riparian proprietors in accordance with the rule of the common law, or be enjoyed by those who may divert and appropriate them. They declare that the water rights do not originate in grant from the general government by virtue of the act of 1866, but that that act merely, as has been repeatedly declared by the Supreme Court of the United States, recognized pre-existing rights.

Forbes vs. Gracey, 94 U. S. 762;

Jennison vs. Kirk, 98 U. S. 453;
Broder vs. Water Co., 101 U. S. 274.

If it be true that the rights existed before there was any legislation whatever on the subject by Congress, in what did they originate? Clearly in the local law. But neither a state nor any subdivision of the state has any power to dispose of the public lands. That power is vested, by the express provisions of the constitution, in Congress.

The deduction is inevitable that if these rights were in existence prior to the time that Congress acted at all, they must have been derived from some authority other than Congress.

The act of 1866 was simply a formal renunciation on the part of the United States of any claim it or its grantees might have to the continued flow in the stream of water that had been appropriated, assuming that it or they had any such. It was, as disclosed by its very terms, a statute of repose, not of grant. Nor can we imagine, as seems to be intimated in Howell vs. Johnson, that by this statute power was delegated to the local legislatures to enact laws looking to the disposition of the waters of the streams on the public domain. If such waters are indeed incident to the lands over which they flow, such a delegation of power to legislate on a subject confided by the constitution exclusively to Congress would be void.

A recent declaration by the Supreme Court of the United States leads clearly to the conclusion that the views so generally entertained as to the origin of water rights in grant from the government, expressed by the learned federal judges in the cases referred to, must be revised. Reference is made to the following from

U. S. vs. Rio Grande Irr. Co., 174 U. S. 690:

"As to every stream within its dominion, a state may change this common-law rule, and permit the appropriation of the flowing waters for such purposes as it deems wise."

If a state can do this, it must be because it owns the waters and simply permits their use obedient to its laws. If it may take away riparian rights as understood at the common law and give the use of the water to appropriators, it may, when that course seems to it wise, abolish the system of appropriation and invest riparian owners with such rights in the stream as they would enjoy at the common law. If we hold to the theory that the appropriator of water enjoys a grant from the general government, it would be simply confiscation to take it away from him and distribute it among riparian proprietors; and equally, if the riparian proprietor enjoys riparian rights in the stream as an incident of his grant of lands from the government, the legislature is powerless to take that property away from him.

Judge Hallett says in

Mohl vs. Lamar Canal Co., 128 Fed. 776-779,

that an appropriator of water enjoys a mere license or privilege to take the water and "has no contract with or grant from the government, federal or state, in respect to his privilege."

Entertaining, as we have heretofore shown, the theory that the riparian right accrues, as against all subsequent appropriators, in favor of the riparian grantee of the government, it has been held in North Dakota that an act abolishing riparian rights is void as to accrued rights.

Bigelow vs. Draper, 69 N. W. 573.

As all lands in a state, save its own, are held either in private ownership or belong to the government, and the government as a proprietor enjoys exactly the same rights as any other owner, it follows that the state can not abolish the riparian right, according to the reasoning of these decisions, except as to its own lands. Of course, the Supreme Court of the United States contemplated and expressed its view of the validity of legislation of a much more sweeping character.

Rights which one enjoys by reason of his ownership and interest in property, under the laws existing at the time of the acquisition of that interest, cannot (subject, of course, to the police power of the state) be taken away from him by subsequent repeal or amendment of the law, by virtue of which he enjoys such rights.

B. & B. Co. vs. M. O. P. Co., 25 Mont. 41.

It is respectfully urged, accordingly, that, in view of this late declaration of the Federal Supreme Court, and the views repeatedly expressed concerning the act of 1866, the theory advanced by the Supreme Courts of Colorado, Wyoming and Montana, and concurred in by the courts of last resort in the other interior States in the arid region, that the waters within their borders belong to the public, to the state, is correct, and must ultimately be adopted.

It is said, in some of the decisions referred to, that the common law, as it defines the rights of riparian proprietors, is inapplicable to the conditions existing in regions where irrigation is necessary, and therefore that the riparian right does not exist. But if the riparian proprietor does not own the water or the right to use it, who does? There can be but one answer. It belongs to the public, to the state.

That the state owns the navigable waters within its borders and the soil under them is not open to question.

Shively vs. Bowlby, 152 U. S. 1.

On acquiring new territory, the general government becomes invested with the title to such waters and lands, but holds them, not as it holds the general body of the public domain, subject to disposition for the benefit of the general treasury, but in trust for the people of the state or states, which may ultimately be formed out of the new territory, which state or states, on being admitted, have the absolute right of disposition of such lands and waters,

Id. pages 48 and 49,

without any permission from Congress.

And why has the state the title to navigable waters and the soil under them? Plainly because such waters are devoted to a public use as public highways. It is not necessary to go beyond Shively vs. Bowlby, to find an answer to this question.

Now, in the arid regions, irrigation is a public use of importance no less than is navigation in the more humid sections. The great empires now arising in majesty out of the heart of the American Desert, could never have been heard of, as their courts have declared, were it not that their waters have been held devoted to this great public use. The Supreme Court of the United States did not hesitate to say in

Fallbrooke Irrig. Dist. vs. Bradley, 164 U. S. 112-164:

"We have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use." It is declared to be such by the constitution and statutes of nearly every western state.

Now if the state owns the navigable waters within its borders, because they are devoted to a public use, why does it not equally own the non-navigable waters in those states where they are, and since civilization had its feeble beginnings within their territory, have been devoted to a public use?

In other words, are not the waters of all streams in the arid regions "public waters" and are they not to be regarded as "publici juris" as they were anciently regarded by the common law of England?

This conclusion is arrived at by a course of reasoning even more satisfactory than that just pursued. The petitioners deny that (to use the language of Judge Knowles in Howell v. Johnson) "the water in an innavigable stream flowing over the public domain *is a part thereof*" or that the national government being the owner of the land is, therefore, the owner of the water flowing over it, or that it "can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper."

They assert as an indisputable proposition that the United States has no right except a proprietary right in the public lands within a state. They have exclusive jurisdiction over limited areas, but those may be omitted from consideration in this discussion. In the general body of the public lands, as the owner thereof, they have just such rights as a private individual would have, were he the owner of them. To that part of Montana lying east of the mountains they acquired title from France by the Louisiana purchase. As the owner of such lands they have exactly the same rights as would a private citizen had he been the grantee of the French republic instead of the nation. Their rights in these

lands are proprietary, not governmental, a distinction made clear by Judge Edmonds in

Gould v. Hudson R. R. Co., 6 N. Y. 540,

in which he uses the following language:

> "When regarding the rights of the State in respect to lands, we must be not unmindful that it has two interests, one governmental and the other proprietary. Or, as it is divided by M. Prudhom, in his *Traite du Domain Public* (*the public domain*), which is that kind of property which the government holds as mere trustee for the use of the public, such as public highways, navigable rivers, salt springs, etc., and which are not, of course, alienable; and *the domain of the State*, which applies only to things in which the State has the same absolute property as an individual would have in like cases."

Accordingly, the United States owns the waters of the streams flowing over the public lands as a private individual, did he own these lands, would.

Now the owner of land bordering on an innavigable stream or one owning the land on both sides of the stream and the whole or any part of the bed of the stream does not own the stream or the waters in it, even in those states where the common law doctrine of riparian rights has its full application.

Expressions in plenty, both in the text-books and in the opinions of courts where accuracy was not required or at least observed, can be found to the effect that the owner of lands bordering on an innavigable stream owns to the center thereof, both the soil underneath and the water in it. But there is nowhere recognized any such ownership. Kent's language is

> "He (the proprietor of lands on the banks of a river) has no property in the water itself, *but a simple usufruct* while it passes along. *Aqua currit*

et debet currere ut solebat is the language of the law."

III Kent's Commentaries, 439.

"None can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

Washburn on Easements, 218 (4th Ed. 296).

"The proprietors (riparian) have no property in the flowing water, which is indivisible and not the subject of riparian ownership, but may use it for any purpose to which it can be applied beneficially without material injury to others' rights."

Gould on Water, 204.

"There is no special property or ownership in *running* water. While it remains in the earth intermingled with the soil itself, or while it lies there, or even when upon the surface in a state of inertia, it is the property of him who owns the land; but when it has liberated itself and assumes a distinctive form apart from the soil, and forces itself from the boundaries in which it has been confined and assumes the attributes of a running stream, however small in proportions, or insignificant in the purposes to which it can be applied, it at the same time, loses its character as property, and, like light and air, becomes subject to the reasonable use of every person through whose land it flows but still is the actual property of no one.

"There are rights incident thereto in the owner of the soil which cannot be violated with immunity; rights which are distinct from those enjoyed by the public generally, and which exist not because of any special property in the water, but because of the ownership of the land over and through

which it flows, and the rights that are necessarily created thereby. Every person has a right to have the air that diffuses itself over his land come there in its natural purity and in its usual volume, subject to such reasonable interferences therewith as arise from a reasonable use of it by others. So with water. When it takes a course and settles itself into a natural channel it becomes the right of every person to have it flow over his land in the natural channel, undiminished in quantity and unimpaired in quality, except to the extent that grows out of and is inseparable from a reasonable use of it for the usual and ordinary purposes of life by those above him on the stream."

1 Wood on Nuisances, Sec. 332.

The Supreme Court of Ohio having said in

Gavit v. Chambers, 3 Ohio, 497,

that "He who owns the lands upon both banks owns the entire river, subject only to the easement of irrigation, and he who owns the land upon one bank only, owns to the middle of the river, subject to this same easement,"

took pains to say in

Pollock v. C. S. R. Co., 56 Oh. St. 655-666, 47 N. E. 582:

"This does not, however, mean that the ownership is an unqualified one, for it is universally conceded that the water of a stream is not the subject of ownership in the ordinary sense. As expressed in Clancy v. Clifford, 54 Me. 487, 'The right of property is in the right to use the flow and not in the specific water.' That is, it is but a usufructory right, a right to enjoy that which belongs to another and to draw from it all the advantage it will produce without wasting its substance."

The error of asserting that to the riparian owner

belongs the stream to its center, is clearly elucidated in the opinion in

McCarter v. Hudson Co. W. Co., 65 At. 489,

more particularly to be referred to hereafter.

All that can be asserted, then, of the right of the government under the rules of the common law, with respect to streams flowing through or which border its lands, is that it is entitled to the use of the water as it flows by, because of its ownership of the land, unless, indeed, it can be maintained that the government has a higher right as a land owner than has a private proprietor.

In this connection attention is especially invited to the language above quoted from Wood on Nuisances, to the effect that however insignificant a running stream may be, it is the actual property of no one, but there are rights incident thereto in the owner of the land over and through which it flows, *because of his ownership of such land.*

Now why does he have such rights and what are they? He has them because they are given to him or recognized to be in him by the law of the state in which such lands lie. It has been repeatedly held that the grantee of lands from the United States has just such rights, by virtue of his ownership, as are accorded by the laws of the state in which the lands lie, to the owners of lands generally. A patent from the general government to lands in one state may carry with it greater or less rights than an identical patent to lands in another state. In Massachusetts it was decided in an early case,

Weston v. Alden, 8 Mass. 136,

that:

> "A man owning a close on an ancient brook may lawfully use the water thereof for the purpose of

husbandry, as watering his cattle or irrigating the close; and he may do this, either by dipping water from the brook and pouring it upon his land, or by making sluices for the same purpose; and if the owner of a close below is damaged thereby, it is *damnum absque injuria.*"

And this decision was affirmed in

Anthony v. Lapham, 5 Pick. 175-177.

On the other hand it was held in

Evans v. Meriweather, 4 Scam. 492,

that the riparian proprietor "may consume all the water for his domestic purposes, including water for his stock. If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor."

If, now, one should obtain a patent from the federal government for lands in a state in which prevails the rule asserted in the Massachusetts case with respect to the right to use water of a stream for irrigation, he would have that right, under his patent. If the land lay in Illinois or in some state recognizing a rule like that asserted in Evans v. Meriweather, he would not.

Lest any misapprehension might arise it should be said that under the doctrne of the Massachusetts case, the owner must connect his sluices with the stream below not being responsible for loss by absorption or evaporation from his ditches. Likewise that the Illinois court holds that though irrigation is not a natural want in Illinois, justifying the taking of water for that purpose, it is in more arid regions.

The conflict in the decisions of the courts of the several states in relation to the acquisition of easements of

light and air by implication from grants or by prescription is well known.

Washburn on Easements, 497-506.

In some states a patent from the government might carry with it an easement of light; in others it would not.

In some states a patent from the government to lands bordered by a navigable stream carries with it to the patentee rights to the middle of the stream; in others, his rights stop at the shore. In Iowa he would hold only to high water mark; in Illinois and Mississippi, he owns the bed of the stream to the middle thereof.

Hardin v. Jordan, 140 U. S. 371.

In the case last cited Mr. Justice Brewer said:

> "Beyond all dispute the settled law of this court established by repeated decisions is that the question of how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the state and the decisions of its highest court furnish the best and final authority."

This court declared in

St. Anthony v. Board, 168 U. S. 349,

that the property rights of the riparian proprietors are measured by the local law, a proposition more elaborately stated in

Packer v. Bird, 137 U. S. 661,

in the following language:

> "Whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property by the grantee."

The fundamental error of Judge Knowles in Howell v. Johnson lay in assuming that because the United States had certain rights in the streams of the State of Iowa, for instance, (which he apparently assumed amounted to the absolute and unqualified ownership thereof) when title to the lands therein was first acquired, it had the same rights in,—the same absolute ownership of the streams in Montana. These views led him to say in

Cruse v. McCauley, 96 Fed. 369-373:

> "In the eastern part of Montana, the United States acquired its title to lands by virtue of what is called the 'Louisiana Purchase.' There cannot be one rule as to the right to the flow of water over its lands in Montana, and another rule as to its lands in Iowa and Missouri. In these last-named states there can be no doubt of the rule that the national government would be entitled to water which is an incident to its land. As the United States then owns the waters which are an incident to its lands, it can dispose of them from its lands if it chooses."

It is an irresistible conclusion from the foregoing authority that the rights of the United States in the streams flowing over public lands in Iowa and in Montana may be, as they are, essentially and radically different. And this court so held in

Boquillas L. & C. Co. v. Curtis, 212 U. S. 339,

when it declared that a statute adopting the common law "is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames."

It must be conceded that the proprietary rights of the grantee in fee of the government measure the proprietary rights which it had. Its patent grants all the rights it had by virtue of its ownership of the soil, except so

far as the federal statutes limit its operation. If the patentee has riparian rights in a stream, his grantor had them and conveyed them to him; if he has not, it is because the government had none to convey.

The question is, then, not whether the United States owns the streams flowing over the public lands as a part thereof, for it has been demonstrated that neither it nor any riparian proprietor owns the streams, anywhere, but what rights have the United States in such streams by virtue of their ownership of the land over which they flow?

And the answer is plain. They have just such rights as the local laws recognize in the private owners of lands through or along which such streams run. If the local law recognizes the existence of "riparian rights,"—by which is here meant the right of the riparian owner to have the stream continue to flow past or over his land as it was wont to flow,—the United States "own" the streams to just that extent.—no more; if the local law does not recognize the existence of riparian rights as above defined, if it recognizes the right of any one without responsibility to the riparian proprietor to "appropriate" and divert the water of the streams, they "own" the streams in no sense.

Now the local law of neither Wyoming nor Montana never did concede to the owner of lands through or along which an innavigable stream flowed, the right to have the stream continue so to flow as against an appropriator of the same. The courts of these states assert, in common with those of the arid region generally, that because wholly unsuited to the conditions under which settlement and development of the country,—viewed either from the standpoint of its mineral or its

agricultural resources, was possible, those provisions of the common law which insured to the owner of riparian lands the continuous flow of a stream through or along them, never became a part of the local law, nor could he claim any rights by virtue of them. In other words they declare that the grantee of the government, and of necessity the government who was grantor, has no "riparian rights" and never did have any.

If the United States ever did have riparian rights in the streams of the arid states, it is undeniable that one to whom patent was issued for lands prior to the act of 1866 acquired those riparian rights by his grant. Since that time, of course, he took, subject to any accrued water rights. But the decisions in the arid states deny that a patent issued to one prior to 1866 gave to him any "riparian rights" as against an earlier appropriator,—a conclusion that is defensible only on the theory that the government had none such to grant.

Coffin v. Left Hand Dock Co., 6 Col. 443.

If it had any such where did it get them? Whatever view may be taken of the opinions of those courts which hold that the common law doctrine of riparian rights is not in force in the arid states because of the natural conditions, the reasoning of the Supreme Court of Arizona in

Clough v. Wing, 17 Pac. 453,

seems irresistible. It contends that the government acquired no such rights in public lands in that territory because the Mexican government had none such to grant under the treaty of Guadaloupe Hidalgo, the law of Mexico recognizing no such right in the owner of lands.

Neither did France under the Louisiana Purchase. In the opinion in the case last cited reference is made to

the remark of Lord Denman, in Mason v. Hill, 5 Barn & Adol. 1, that under the civil law water was *publici juris* and that by it the "first person who chooses to appropriate a natural stream to a useful purpose has title against the owner of the land below, and may deprive him of the benefit of the natural flow of water."

Apparently, there was some question whether this principle obtained full recognition in the law of France. In a note to Article 42 of the "French Civil Code," by Blackwood Wright, the eminent author says:

> "There was up to 1898 a great deal of doubt and difference of opinion as to whether streams which were not navigable, and down which rafts could not be floated, were private property or part of the domaine public. The new law of 8th April, 1898, gives the riparian owner half the bed, and makes the water nobody's property, the English theory—allowing at the same time to the riparian owners certain rights of user of the water."

But Ch. J. Reid of the Court of King's Bench for the District of Quebec, declared in

Poissonault v. Oliva, Stuart's Rep. 564,

after a review of the law of France in relation to the ownership of waters of streams, that:

> "The waters of all rivers whether navigable or not navigable, *being matters of public benefit and public interest*, are vested in the Crown and no man, whether seignior or other, can hold or exercise a right over them, without special grant from the crown."

Thus we return to the argument heretofore advanced that the vital public interest in the water of the innavigable streams in the arid regions, operates to take them out of the realm of ownership by the general government except in trust for the states eventually to be created, in

the same manner that it holds in trust for such states the waters of navigable streams, as was decided in Polland v. Hagan, and repeatedly since.

The overpowering character of that public interest is exhibited in

Clark v. Nash, 198 U. S. 361,

in which this court held that a statute of Utah, permitting condemnation of the lands of another for an irrigating ditch to be constructed by a private individual for the irrigation of his own lands is valid, the use being a public one.

When it is asserted that the United States does not own the streams flowing over the public lands, it will be understood that it is not meant that its dominion over them is not absolute until statehood; its proprietary right only is questioned. Further, it is conceded that it has the title to such streams but holds it, not by the same right that it holds the lands, but in trust for the people of the state, in accordance wih the principle of Pollard v. Hagan. Moreover, it is not to be considered that it is denied that either the government or any other riparian proprietor has no interest whatever in the stream flowing over or by his or its lands,—as for instance, the right to cut ice from it, or the right to have it flow unpolluted, or to have it flow in full volume as against one not diverting to a useful purpose under the law of the state. Whatever rights of use appertain to riparian ownership, they are such as are accorded by the local law, the waters themselves being the property of the state.

An article by the author of Water Rights in the Western States (Wiel) in

Harvard Law Review,

contends that there can be no ownership of running water any more than there can be of air or fish in the sea, the law of the states in relation to the appropriation of water being defended upon the ground that the state may regulate the taking of that which is the property of no one,—in the same manner that game laws are justified. But though the conclusions of the author are supported by a wealth of learning and research, they seem irreconcilable with the oft repeated declaration of this court that the states own not only the beds of navigable streams, but the waters flowing in them.

The proposition for which the petitioners herein contend, receives powerful support from a recent decision of the Court of Appeals and Errors of the State of New Jersey,

McCarter v. Hudson Co. W. Co., 65 At. 489,

affirmed by this court, on writ of error, in

Hudson Co. Water Co. v. McCarter, 209 U. S. 349.

It asserts that subject to whatever rights the local law accords to the riparian owners, the state owns the streams within its borders and can lawfully prevent the diversion of their waters beyond its borders, though the assent of all riparian owners is obtained. The following is quoted from the opinion:

> "Since the exercise of all rights of private ownership, bp all riparian owners, still leaves the stream to remain as a running stream, there remains a residuum of common or public ownership that, under our system, rests in the state as a trustee for all the people."

If the State of New Jersey enjoys such a proprietary right in the waters within its boundaries, so must each

western state, or it would not have been admitted to the Union on an equality with the original states. It was upon this consideration that, notwithstanding its general proprietorship of the lands in the newly acquired western territory, it was held that the general government did not become the owner of lands under tidal and navigable waters, and that a patent from it to such lands would be void.

It is alone upon this theory that the legislation of the western states, prescribing the manner and conditions of the acquisition of a water right, can be justified. If the general government owns the waters of the streams flowing through the public domain, what right has a state to pass laws looking to their disposition? Why must one adhere to the laws of Montana or of Wyoming in the acquisition of a water right in those states, respectively, if the property right to be acquired belongs neither to the one nor to the other, but to the United States? Are all these laws, truly enacted with reference to a subject matter of which the states have no jurisdiction whatever? Not at all. They are legislating with reference to the disposition of their own property and their own rights, and Congress recognized this in the Act of 1866.

The validity of legislation of this character was upheld in

Gutierres vs. Albuquerque Land & Irrig. Co., 188 U. S. 545.

Now if the respondents in this case must look to the State of Wyoming for whtatever rights they have to the waters of Sage Creek, it follows logically that they have no water right which they can assert in this Court against these defendants. If the State of

Wyoming owns all the waters in that state, it follows, "as the night the day," that the State of Montana owns all the waters in that state; that neither the one nor the other enjoys any priority, and that neither can grant any priority as against the other, or any of its grantees. This theory of the ownership of water rights contemplates that from the beginning the waters were held in trust for the people of the State that was to be, and which eventually became the owner when it came into existence. Montana owns all the waters within its borders, and Wyoming owns all the water within its borders, each being entitled to dispose of them as it sees fit.

If Montana allows any of her waters to flow down into Wyoming, they belong to the latter state, of course. If any one allows tailings to run away from his mill and to be deposited upon the land of another, having at the time no purpose to reclaim them, they become affixed to—a part of—the land on which they lodge.

1 Lindley on Mines, 426.

If Wyoming should allow any of its waters to flow down into Nebraska, they belong to that state.

Montana is under no obligation to give any part of her waters to Wyoming, nor to allow them to flow down into that state, that they may be enjoyed by Wyoming licensees or grantees. When respondents Morris and Howell constructed their diversion works, they are presumed to have known that more or less of the waters they were seeking to appropriate came down from Montana, and that she and her citizens might eventually desire to make use of them. So, if one constructed a cyaniding plant on the lower courses of a stream, and caught tailings coming down, he could not complain if the owner of the mill from which they came decided to change his policy,

and impound them.

This view of the law and of the rights of the states gives no advantage to Montana, nor to any state. What more reasonable rule than that the people of Montana own the waters that fall from the heavens upon their soil and that they are, and of right ought to be, entitled to apply them to any beneficial use they may see fit until they pass beyond the borders of that state? So Wyoming owns all the bounties of the heavens that fall on her fields and mountains, but when she allows them to get away from her into Nebraska or Kansas, she has no means, as she has no right, to reclaim them. Why should the states east or west, as the climate grows more and more humid, claim not only the rain that falls on them, but a part of that which comes to bless their neighbors in the higher and dryer regions?

But if it were a fact that this theory of the law would place the people of Montana at an advantage, that is their good fortune. They may enjoy it themselves, or they may admit their neighbors to share it with them. In

McCready vs. Virginia, 94 U. S. 391,

the Court held valid a law of Virginia excluding citizens of other states from planting oysters within tide waters of that state. It was held that, as these waters belonged to the State of Virginia and its people, they might reserve them to their own use, or share them with others as they saw fit.

But if this view of the rights of the people of Montana should not be accepted, still it can scarcely be asserted, unless the theory of original national ownership is adopted, that one appropriating water in Wyoming has

any more standing in a court of the State of Montana to assert a priority against a citizen of the latter state claiming an appropriation under its laws, than would a citizen of Montana have under similar circumstances, in the courts of Alberta against appropriators in that province.

If citizens of that province who divert the waters of Milk River, for instance, came into the courts of Montana to enjoin diversion from the same stream in that state, what would be the answer? The parties would unquestionably be relegated to such relief as could be afforded through negotiations between the state departments of their country and ours. Indeed negotiations of that character have been pending for some time between the department of state and the dominion government, in view of the work undertaken by the reclamation service, to store water by raising St. Mary's Lake in Montana for use along the lower courses of the Milk River, which stream, rising in that state, flows into Canada and back again into the state in which it has its source.

Inasmuch, however, as Montana and Wyoming can neither negotiate treaties with nor make war upon each other, this court is invested with jurisdiction, under the constitution, to settle differences which would otherwise be the subject of diplomatic regulation, in a suit brought by one against the other, as was done in Kansas v. Colorado. There would have been no occasion to bring that action, nor would this court, in all probability, have taken jurisdiction if a citizen of Kansas claiming riparian rights could have gone into the federal court in Colorado and maintained an action like this against the citizen or citizens of that state who diverted the stream to his

damage. If this action can be maintained, no reason can be advanced why any citizen of Kansas owning lands and claiming riparian rights in that state along the Arkansas River may not now prosecute just such an action as this. There is certainly nothing so sacred about the right of appropriation as to justify the belief that one claiming a right of that character in a stream may enforce his right in a state farther up the stream, while one claiming a right in the same stream as a riparian owner cannot.

Before dismissing this phase of the case reference should be made to the consideration which the question it presents has had from the state courts.

The Supreme Court of Colorado considered a closely related question as to whether water could be diverted and appropriated in Colorado for use on lands in New Mexico, but found it unnecessary to decide the question.

Lamson vs. Vailes, 61 Pac. 231.

The same question involved in the last cited case was presented to the Supreme Court of Wyoming.

Willey vs. Decker, 73 Pac. 210.

That Court, having committed itself unqualifiedly to the rule of state ownership—the "Colorado doctrine — reaches the conclusion by a course of reasoning difficult to trace, that the courts of that state may enjoin one who, under its laws, diverts water in that state from a stream having its source in Montana, of whose waters defendant made an earlier appropriation in Wyoming, but for use in Montana. It is but just to say that though the question was deemed by the trial judge so important and difficult that he certified it up pursuant to a provision

of the constitution of that state, the Supreme Court itself declares that it did not have the assistance of counsel for the defendant. But one side of the case was argued, and it decided in favor of the party represented.

The question presented could have been readily solved upon a theory in entire harmony with the views of the Court expressed in earlier opinions. It would have been sufficient to say that the State of Montana had not abandoned to the State of Wyoming and its citizens all the water which it allowed to run down the stream in question, but only so much as was in excess of the needs of the plaintiff for use in Montana. The very fact that the Montana citizen was ready with his ditch to take it out, though in Wyoming, to carry it on to lands in Montana, disproved any intention to abandon. It presented simply a question of the right of the Montana claimant to occupy the Wyoming soil with his ditch; or at most, the question of whether the Wyoming law permitted him, a citizen of Montana, to come within the State of Wyoming and carry water through this ditch to lands beyond its borders. That question is clearly determined wholly by the construction of the Wyoming statutes. In fact the Court recognized, in one part of its opinion, that this was the real question in the case. (73 Pac. 222.) But the Court proceeded to the consideration of the case as though it presented the identical question involved in this action, whether an appropriator in Wyoming can come into a court in Montana and enjoin an appropriator in Montana from diverting water from a stream therein for use on lands in Montana.

The views expressed by the Court in

Farms Investment Co. vs. Carpenter, supra,

are reiterated at considerable length.

The attention of this court has heretofore been invited to the irreconcilablity of the position taken by the learned District Judge in Howell vs. Johnson, supra, and that assumed by the Wyoming court in the case named,—the one asserting a Federal. and the other a State origin of water rights. On that very difference of opinion, the decision in Howell vs. Johnson turned, the counsel for the defendant therein taking the position asserted by the Wyoming court in Farms Investment Co. vs. Carpenter; the Court, the other view. Because, the court held, the right to the water came by grant from the general government, not restricted in the disposition of the public lands and their incidents by state lines, a right was acquired by complainant, which he could assert anywhere.

Though the decision in Howell vs. Johnson was called to the attention of the Wyoming Court in Farms Investment Co. vs. Carpenter, by the brief of counsel (9 Wyo. 113), the Court refused to follow its reasoning, and yet when it canvasses, in Willey vs. Decker, supra, the question it assumed to be involved, it actually based its conclusion on the reasoning of Howell vs. Johnson and followed that case as its guide, saying:

> "The Federal Court sitting in Montana recognized a similar right in the case of a Wyoming appropriator from another stream flowing from Montana into Wyoming, and held that an invasion of his rights by the diversion of water in Montana might be enjoined. Howell vs. Johnson (C. C.), 89 Fed. 556. In that case the learned judge said: 'The idea that there can arise any international water right question in the case of an appropriation of the waters of an unnavigable stream cannot be maintained. The rights to such waters, after the national government has disposed of them, must always be

a question pertaining to private persons.' Some expressions contained in the opinions in that case, in respect to state ownership and control of the waters of unnavigable streams have been supposed destructive of an essential principle in the law of irrigation. It is not necessary that we agree with all the reason given by the Court for the conclusion announced, nor that we assent to all the views expressed in the opinion. We think there can be little question but that it was rightly held that the plaintiff in the case had secured a right by appropriation to the waters of the stream, as against a subsequent appropriator in the other state, which might be protected in the courts of such state against injury by acts occurring therein."

The case is not persuasive for the reason suggested.

Perkins County vs. Graff, 114 Fed, 441,

is referred to in Willey vs. Decker, as shedding some light on the question involved. It is more pertinent to the case there presented than here. It involved the question of the validity of bonds issued to bring water out of a stream in Colorado for the irrigation of lands in Nebraska. It can be seen that, at best, that simply presented the question as to whether such permission was granted by the laws of Colorado, and nothing in the opinion aids us in the solution of the question here involved.

The matter came incidentally before the Court in

Conant vs. Deep Creek Co., 66 Pac. 188,

and, without much attention to the subject, apparently, Howell vs. Johnson was approved.

The question is to be solved, as we submit, by a determination of the question as to whether the right arises by a grant from the general government, or whether the citizen of a state enjoys his appropriation by virtue of the state's ownership of waters within its borders. It is

respectfully submitted, for reasons considered, that the latter theory must be adopted.

III.

THE RIGHTS ACQUIRED IN WYOMING WERE SUBORDINATE TO THE RIGHTS ACQUIRED IN AND ON THE CROW INDIAN RESERVATION IN MONTANA.

But there is a special reason why, even though the principle should not be deemed of universal application, the result to which it leads must be arrived at here. The Crow Indian Reservation, defined by the Treaty of May 7th, 1868, embraced all of the County of Carbon, Montana, its southern boundary being coincident with the southern boundary line of that state.

Revision of Indian Treaties, p. 327.

By the treaty of 1890 the lands occupied and owned by the appellants and watered by them from Sage Creek, as well as the head waters of that stream, were thrown open to settlement. Theretofore, no one was permitted to go within that region to acquire either lands or water rights. The citizens and settlers of Wyoming might occupy the territory right up to the Montana line for a stretch from the 107th Meridian West, to where the Yellowstone River crosses it, a distance of 150 miles, and might, if the contention of the appellant is correct, appropriate every drop of water collected in that vast and now marvelously productive and wealthy region, which should flow southward, leaving it, when it should eventually be open to settlement, a parched and hopeless desert. By what right may the citizens of Wyoming thus claim a priority in these waters over those of Montana? If they may, our state is most grievously burdened by its even now vast Indian Reservations. When

they are eventually opened, as they are now fast being, we may find that citizens of other states have, by virtue of acts done therein, acquired the right to come within our state and appeal to the courts to divest the settlers on them, of the waters taken from the streams that flow through their lands, and have their sources within the newly opened territory.

Fortunately, a recent decision of this Court promises to exempt us from such a calamity. It was held in

Winters v. United States, 207 U. S. 564,

that the waters flowing through, or bordering on the Belknap Indian Reservation were reserved for the use of the Indians occupying the Reservation, and were not subject to appropriation.

The same consideration which led the Court to the conclusion at which it arrived in the case forces the conviction that the waters in question in this case were not subject to appropriation until after the opening of the Crow Reservation, and then at least for a reasonable time only by the setlers thereon.

The Government recognizes a kind of property right on the part of the Indians to the waters as well as the lands of the reservation. In Winters vs. U. S., this view is adopted. For many years the policy has been pursued of reducing the area of these reservations upon some consideration flowing to the Indians. Our whole vast state, or the greater portion of it, was at one time one or more Indian reservations.

Winters vs. The United States, supra.

It was contemplated many years ago that eventually the lands within the reservations would be thrown open to settlement, and an equivalent given to the Indians. More recent statutes provide for the entry of land so

opened under the homestead law, with a payment, the benefit of which flows to the Indians. Such are the provisions of a late act of Congress again reducing the limits of the Crow Reservation.

Is it possible that citizens of Wyoming, under the sanction of either state or federal legislation, had the right to appropriate to themselves all the waters of the reservation by diversions made in Wyoming so that when they should eventually be thrown open to settlement, the Indians could realize nothing for their lands over and above the trifle at which they would sell for purely grazing purposes?

An act passed by Congress opening the Blackfeet Reservation, applying the law announced in

Winters vs. United States, *supra*,

provides for the allotment in severalty to the Indians of lands in the reservation, and the entry of the remainder at a price fixed, the amount realized to become a trust fund for the Indians, and further provides that *not only the Indians but the settlers purchasing*, shall have a prior right to the use of so much water as they may divert for the purpose of irrigation within two years from the opening of the reservation . The priority given to the settlers is given, of course, to increase the salability of the lands. Can it be denied that such a provision in the act of opening the Crow Reservation would have been valid, and that the settlers on the reservation would have had the priority? But if they would it would be because the Wyoming diverters had acquired no right, since if they had acquired a priority right they could not be divested of it by a subsequent act of congress.

As the waters of the Crow Reservation were not subject to appropriation when the respondents claim to have

made their appropriations, they cannot maintain this action. At least a court of equity will not put forth its arm to aid in the enforcement of so inequitable an advantage if, even as a matter of strict legal right, the respondents enjoy it.

The suggestion made by the learned district judge that assuming that the waters were not subject to appropriation prior to the opening of the reservation, the appropriations became effective *eo instanti* upon the accomplishment of that fact, does not meet the case, and nothing in the decisions cited in support of this view seems to sustain it. The waters are for all practical purposes subject to appropriation, if, immediately upon the reservation's being opened, prior appropriations take life as against those made on the land made subject to entry. However diligent settlers on the newly opened lands might be, they could by no possibility secure a priority.

Under the law as announced in the Winters case, the right to the use of water on the reservation belonged to the Indians by virtue of the treaty with them, and passed, on the opening of the reservation, to those who appropriated the lands under the act of Congress making them subject to entry, upon their compliance with the laws of Montana.

IV.

LACHES, ADVERSE USER AND ABANDONMENT.

And if the court ever would give to appropriators such an advantage, it ought not to do it in this case where the evidence shows that the respondents slept on their rights for ten years and more before bringing this action.

It is conceded that as to respondent Howell—in fact he himself tells—that he began to suffer because of the want of water in the fall of the year 1893, the shortage being occasioned by the diversions of the petitioners. His petition was filed September 5, 1903.

The respondent Morris says he has been short of water since 1894 because the petitioners have taken it, and the evidence is undisputed that he has not raised any crops for five or six years. No explanation whatever of this long delay is made; no excuse is offered. No reason is assigned why this suit or some similar action was not begun long ago. The petitioners might very well believe, by reason of this long inactivity and failure to question their rights or to interrupt their acts, that their right to the water was conceded. Assuming it to be, they made expensive improvements by which their lands have become producing farms and orchards. The character of improvements—if that term can be used properly in this connection—on the lands of respondents and intervener is shown by photographs introduced in evidence.

Record, pages 200-201.

The full period of the statute of limitations of both Montana and Wyoming has run against the claim of the respondent Howell, ten years barring actions to recover realty in both states. But a Wyoming statute is more important. It provides:

> "And in case the owner or owners of any such ditch, canal or reservoir shall fail to use the water therefrom for irrigation or other beneficial purposes, or shall refuse to furnish any surplus water to the owner or owners of lands lying under such ditch as hereinafter provided, during any two successive years, they shall be considered as having abandoned the same, and shall forfeit all water

rights, easements and privileges appurtenant thereto, and the waters formerly appropriated by them may be again appropriated for irrigation and other beneficial purposes, the same as if such ditch, canal or reservoir had never been constructed."

Sec. 895, Rev. Stats. Wyoming, (1899).

The learned district judge erroneously considered this as a statute of abandonment, and held that the intention to abandon not being shown, the statute is inapplicable. This is a statute of non-user, not of abandonment. It is immaterial why the respondents did not use the water. Their failure to use it worked a forfeiture of their right. The difference between a statute of non-user and one of abandonment is pointed out in

Long on Irrigation, 83.

Abandonment is a question of intent. Failure to use the water, no matter how long continued, does not constitute abandonment. Non-user is evidence of abandonment, but the intent is the essential feature. And on the other hand, if a purpose is established not to use any more, it is immaterial how long the non-use has continued.

Under a statute of non-user, however, failure to use for the statutory period, whatever the reason, or however strong may be the purpose to use again at the first opportunity, works a forfeiture. These principles are sustained by the case of

Smith vs. Hawkins, 110 Cal. 122.

The statute operates as a statute of limitations. No other construction can possibly be given to the statute. The purpose to make the waters of the state available to the utmost is evident throughout the legislation of the State of Wyoming. In the absence of this law, water

which had been appropriated but the right to which the appropriator intended to abandon, would have become subject to appropriation by another the instant be carried out his purpose and ceased using. It certainly was not intended by this law that notwithstanding one had formed a fixed purpose not to use the water again, it should remain unavailable for a period of two years during which time he might be at liberty to change his mind and reclaim it. Clearly not. Its purpose was to fix a limit after which one might safely take it and apply it at expense to some beneficial use without being met subsequently with proof of a purpose on the part of the original owner to resume its use at some later day.

In this case the respondent Howell frankly and bluntly tells that he quit using the water or trying to use it in 1897, and determined not to attempt any further raising of crops until his right to the water should be settled. But under this statute he was obliged, having reached that determination, to commence his action within two years. His averment of a present right to the use of the water is overcome by the facts he submitted in proof.

The evidence places the respondent Morris in the same position. He too has delayed too long.

Nor is it necessary that the *whole* period of the statute should have run in order that the respondents should be denied a right of recovery in this suit.

Appeal is made here to a court of equity. The respondents are not entitled to a decree when they show only a strict legal right. They ask for the extraordinary remedy of injunction. The prayer for the injunction is the basis of the jurisdiction, and it is the only relief awarded. The necessity for the prompt and diligent assertion of his rights on the part of one

seeking the aid of equity has been repeatedly declared by this Court. In

Abraham vs. Ordway, 158 U. S. 416,

is the following:

"The property in dispute, it may well be assumed, has greatly appreciated in value since Mrs. Ordway's purchase, which was more than ten years prior to this suit. It is now too late to ask assistance from a court of equity. The relief sought cannot be given consistently with the principles of justice, or without encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitation; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. It will, in such cases, decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedy as he may have in a court of law. Wagner vs. Baird, 7 How. 234, 238; Harwood vs. Railroad Co., 17 Wall. 78, 81; Sullivan vs. Portland, etc., R. R., 94 U. S. 806, 811; Brown vs. the County of Buena Vista, 94 U. S. 157, 159; Hayward vs. National Bank, 96 U. S. 611, 617; Landsdale vs. Smith, 106 U. S. 391, 392; Speidel vs. Henrici, 120 U. S. 377, 387; Richards vs. Mackall, 124 U. S. 183, 188.

"The appellants insist that, as this suit relates to land, the doctrine of laches as announced in the above cases, has no application. There is no foundation in the adjudged cases for this suggestion. It is true, as

stated by counsel, that in Wagner vs. Baird, just cited, the court says that in many cases courts of equity 'act upon the analogy of the limitation of law, as where a legal title would in ejectment be barred by twenty years' adverse possession,' and 'will act upon the like limitations, and apply it to all cases of relief sought upon an equitable title, or claims touching real estate.' But it proceeds to say: 'But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation distinctly governs the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights. 2 Story Eq. Sec. 1520. A court of equity will not give relief against conscience, or where a party has slept upon his rights.' ''

From

Insurance Co. vs. Austin, 168 U. S. 685,

we make the following extract:

"The preliminary inquiry, therefore, is whether the complainants have so exercised their rights as to entitle them to prevent the city from completing the water works.

"In Speidel vs. Henrici, 120 U. S. 377, 387, the court said, speaking through Mr. Justice Ray:

" 'Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them.' 'A court of equity,' said Lord Camden, 'has always refused aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience,

good faith and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.'

"In Hammond vs. Hopkins, 143 U. S. 224, 250, through Mr. Chief Justice Fuller, the court said:

"'No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there has been gross laches in prosecuting rights, or where a long acquiescence in the assertion of adverse rights has occurred.'"

In Willard vs. Woods, 164 U. S. 502, 524, the Court said:

"'But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded, or the bill demurred to. Sullivan vs. Portland & Kennebec R. R., 94 U. S. 806, 811; Lansdale vs. Smith, 106 U. S. 391, 394; Badger vs. Badger, 2 Wall. 87, 95.'"

In the opinion filed by the learned District Judge, who ordered the decree in this case, it is said in extenuation of, if not as a complete answer to, the claim of laches on the part of the respondent Morris that he "has protested while the supply of water grew less from year to year until finally his ills became unbearable."

Record, page 308.

Even if he had done so, his conduct would be no answer to the claim of laches. In Willard vs. Woods, already quoted from, the court said:

"In Lane vs. Bodley Co., 150 U. S. 193, and Mackall vs. Caffilear, 137 U. S. 556, it was held that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches."

But what are the facts?

The respondent Morris testifies that he never made any complaint whatever about the water; that in the year 1898 he saw petitioner Bean about water. Just what he said to Bean does not appear, but whatever he said was not by way of complaint. Bean said: "that he was going to irrigate that afternoon and he would turn the water down, and he turned the water down the creek, and it run about a half a day; then the water was shut off again."

Record, page 115.

In the year 1902, he went to see petitioner, Wallace Bent. What was said to Bent does not appear in the record, but the respondent Morris says: "Mr. Bent said that he would not let me have any water."

Record, page 117.

He testifies that these two efforts are all he can remember to have made.

Record, page 113.

The testimony is entirely consistent with the idea that he requested that the water be allowed to come down to him as a neighborly accommodation.

The respondent Howell, it will be remembered, testified that respondent Morris had been unable to raise any crops since 1894. He, himself, testified that he had not had more than half enough water for five years.

It does appear, indeed, in the evidence, that at one time the respondent Howell instituted a suit such as this—

doubtless the case of Howell vs. Johnson—but there is no pretense that it was brought against any of these petitioners. While, on the issue of abandonment, the prosecution of a suit against some one other than these petitioners would be pertinent as showing his intent to use the water again, on the issue of laches raised by them, it is no answer at all.

Ignorance of the wrong is the usual excuse for laches. Of course, if protest were made, it would be impossible to aver ignorance. Such a condition would tend to establish, rather than overcome laches.

The burden of establishing facts to overcome the indisposition of courts of equity to enforce rights where long delay in their assertion has ensued, is on the respondent Morris, and unless he avers the existence of such facts in his bill, it is demurrable. In

Hardt vs. Heidweyer, 152 U. S. 547,

the court says:

> "It is well settled that a party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also when and how knowledge was obtained, in order that the court may determine whether reasonable effort was made by him to ascertain the facts."

The Court also in that case quotes from Badger vs. Badger, 2 Wall. 87, 95:

> "The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how long and when he first came to a knowledge of the matter alleged in his

bill."

To avoid, apparently, the force and effect of this rule, respondent Morris alleged in his bill that the wrongs complained of had continued only during "the past three years," that is, the years 1900, 1901 and 1902. He did not frame his bill on the theory that he had been deprived of his water by any act of the petitioners since the year 1894, because, had he done so, the bill would have been demurrable for laches appearing upon its face. Even if he had averred that, for five years, he had been deprived of water essential to the raising of crops, some explanation of his delay would have to be made in his bill, before a court of equity would interpose in his behalf. It might, in this connection, be remarked that, prior to 1895, five years would, in Montana, have absolutely barred his rights, as is the case, or until recently was the case, in California. What excuse could now be made in the bill, if leave were asked to amend it to make it conform to the proof?

Take the case of the respondent Howell. He expressly averred that he has had the use of his appropriation to its full extent since August 1st, 1890, which sweeping assertion he followed with the further averment that, within five years the petitioners had constructed dams and ditches, and that within two years they had deprived him of the water to which he is entitled.

Suppose he had averred in his petition that he had been unable to get water since 1894 sufficient to grow crops, and that in despair he quit trying to raise them after 1897; he would, likewise, have been obliged to make some averment to relieve himself of his evident laches in seeking relief. And what avail would it have been to him, in opposition to a demurrer by these petitioners,

to have averred in his petition that, at some time in the interim, he had begun an action against somebody to prevent interference with his right.

Even though a strict right may possibly be in the parties in whose favor the decree runs, they have no standing whatever in a court of equity. If a complete case of estoppel is not made out, in view of the expenditures made by the petitioners in reliance upon their right to the water, a case is presented in which, if it ever should, the doctrine of laches ought to be applied.

V.

EXTENT OF RIGHTS OF PETITIONERS.

And particularly should it be applied in view of the pettiness of the right which respondent Morris established. His claim that he irrigated one hundred acres is without any support whatever in the record, and the overwhelming weight of the evidence, referred to in the earlier part of this brief, is to the effect that he never watered more than twenty-five acres. He had the uninterrupted use of the water from 1887 to 1893. After seven years the extent of his right ought to be measured by the application he has made of the water diverted. He had had abundant opportunity since 1887 to put so much of his one hundred and sixty acres under cultivation as he saw fit. The respondent Morris put 110 acres of his land under cultivation between 1900 and 1903.

There is no justification in the testimony for awarding respondent Morris any more water than is sufficient for the irrigation of twenty to twenty-five acres. The evidence would justify an inch to the acre, but a law of the State of Wyoming forbids awarding any more than one cubic foot per second for each seventy acres of land, for which any appropriation may be made.

"At the first regular meeting of the board of control, after the completion of such measurement by the state engineer, and the return of said evidence by said division superintendent, it shall be the duty of the board of control to make, and cause to be entered of record in its office, an order determining and establishing the several priorities of right to the use of waters of said stream, and the amounts of appropriations of the several persons claiming water from such stream, and the character and kind of use for which said appropriation shall be found to have been made. Each appropriation shall be determined in its priority and amount, by the time by which it shall have been made, and the amount of water which shall have been applied for beneficial purposes. *Provided*, That such appropriator shall at no time be entitled to the use of more water than he can make a beneficial application of on the lands, for the benefit of which the appropriation may have been secured, and the amount of any appropriation made by reason of an enlargement of distributing works, shall be determined in like manner. *Provided*, That no allotment shall exceed one cubic foot per second for each seventy acres of land for which said appropriation shall be made."

Section 25, Act of 1890, Laws of Wyoming 1890-91, page 98.

The application to a beneficial use is an essential part of an appropriation. If the water was never applied to the irrigation of more than twenty-five acres no appropriation was ever made for more than twenty-five acres. This law, as well as the one above referred to touching non-user, becomes a part of the right, a limitation to which it is subject in any state where an attempt may be made to enforce it.

Davis vs. Mills, 194 U. S. 451.

Another law of Wyoming provides:

"A cubic foot of water per second of time shall be the legal standard for the measurement of water in this state, both for the purpose of determining the flow of water in natural streams, and for the purpose of distributing water therefrom."

Section 38, Act of 1890, Laws of Wyoming, 1890-91, page 102.

In view of these legislative acts it is difficult to see how the decree in this case can be sustained as to either of the respondents. The respondent Morris affords no basis in his bill for a decree awarding him water measured by the standard by which alone he is entitled to have it decreed to him under the Wyoming law. On the other hand the respondent Howell avers in his petition that he is entitled to 6¼ cubic feet per second and without any averment whatever in his petition advising the court as to the quantity of water that is measured by the miner's inch as the standard, he is awarded, 110 inches, miner's measurement.

The petition in intervention does not support the decree in behalf of the respondent Howell; it is unsupported in respect to the amount awarded by any pleading whatever. The rule that the judgment must be supported by the pleadings is as firmly established in the equity practice as it is at law.

Fletcher's Equity, 712.

Nor would the situation be improved if proof had been made of the relation between the two methods of measurement, for it is the rule in equity also that "the court can no more consider what is proved, but not alleged, than what is alleged, but not proved."

Fletcher's Equity, 636.

The respondent Morris's case is in no better shape. He avers an appropriation of 250 inches statutory measurement and is decreed 100 inches "miner's measurement."

A Montana statute provides as follows:

> "Section 2. Where water rights expressed in miners' inches have been granted, one hundred miners' inches shall be considered equivalent to a flow of two and one-half cubic feet (18.7 gallons) per second; two hundred miners' inches shall be considered equivalent to a flow of five cubic feet (37.4 gallons) per second, and this proportion shall be observed in determining the equivalent flow represented by any number of miners' inches."
>
> Session Laws 1899, page 117.

But that, however, is an arbitrary statutory rule, and it need not be said that the extent of the right of the respondent is to be determined by the Wyoming law, not that of Montana. But if the relation between the two standards fixed by the Montana law should be regarded, then respondent Howell, irrigating one hundred and ten acres, is entitled, not to one hundred and ten inches of water, but to forty-seventieths of one hundred and ten, or sixty-three inches; and respondent Morris is entitled to forty-seventieths of twenty-five inches or fourteen inches.

But if the Wyoming law making the cubic foot per second the standard of measurement and limiting the right of the appropriator to one cubic foot for each seventy acres is to be disregarded, still the decree is so indefinite as to the amount awarded as to be incapable of enforcement. What quantity of water is a miner's inch? It is one quantity in one community and another in another.

The court held in

In re Huntley, 85 Fed. 889-893,

that a decree awarding "150 inches, statutory measurement," is void for uncertainty.

Long on Irrigation, 97.

says:

> "So, also, where the plaintiff alleged in his complaint that he was entitled to 'five hundred inches, measured under a four-inch pressure,' of the waters in controversy, a verdict of the jury that he was entitled to 'forty inches, miners' measurement,' was held void for uncertainty, since the term 'miners' measurement' has no fixed meaning, and the miners' inch varies in different localities."

and for the text the author refers to

Dougherty vs. Haggin, 56 Cal. 522.

It is well known that, other considerations being disregarded, water is measured by miners in some places under a four inch pressure and in others under a six inch pressure. Anyway, the amount of water to which the respondent Morris is entitled (we say nothing of the respondent Howell because it seems altogether clear that as to him the decree cannot be sustained) is so pitifully small that in view of his laches, he ought not to have the equitable remedy of injunction against these petitioners.

VI.

THE NOTICES OF LOCATION.

It was conceded in the trial court that the notice of his appropriation filed by respondent Morris did not conform to the requirements of the Wyoming law in force at the time the appropriation was made, but it was insisted, and the court held, that the method of making an appropriation defined by the statute was not exclusive, but that by following it the appropriation related back to the initial act prescribed by the law to be done. And it was

said that Moyer vs. Preston had practically so held, which is doubtless true.

But it will be impossible, as we take it, for any court to hold that since the enactment of the law of 1890 it is possible to acquire a water right in Wyoming except upon compliance with its terms. The whole scheme and purpose of that act was to do away with the contentions and controversies, the uncertainties that arose by reason of promiscuous appropriations made without any official surveillance. The scheme of the act was to afford, through the office of the state engineer, exact information to subsequent appropriators as to the quantity of water already appropriated from any particular stream; to deny to any person the right to place upon record a notice of appropriation of water in amount vastly in excess of what he could beneficially use, and to prevent him from asserting in any other way, to the deterrence of those who might desire to make subsequent appropriations, a right to more water than could reasonably be decreed to them, should his right be adjudicated.

This plan and purpose is deduced from the act as a whole, rather than from any specific provision, but it is sufficiently evidenced by Section 34, as follows:

> "Sec. 34.—Every person, association or corporation hereafter intending to appropriate any of the public waters of the State of Wyoming shall, before commencing the construction, enlargement or extension of any distributing works, or performing any work in connection with said appropriation, make an application to the president of the board of control for a permit to make such appropriation. Said application shall set forth the name and post office address of applicants, the source from which said appropriation shall be made, the amount thereof as

near as may be, the location and character of any proposed work in connection therewith, and the time required for their completion, said time to embrace the period required for construction of ditches thereon, and the time at which the application of water for beneficial purposes shall be made, which said time shall be limited to that required for the completion of work when prosecuted with due diligence, the purpose to which the water is applied, and if for irrigation, a description of the lands to be irrigated thereby; and any additional facts which may be required by the board of control. On receipt of this application, which shall be of a form prescribed by the board of control, and to be furnished by the state engineer without cost to the applicant, it shall be the duty of the state engineer to make a record of the receipt of said application, and to cause the same to be recorded in his office, and to make a careful examination of said application, to ascertain whether it sets forth all the facts necessary to enable the board of control to determine the nature and amount of the proposed appropriation. If upon such examination, the application shall be found in any way defective, it shall be the duty of the state engineer to return the same to the applicant for correction. If there is unappropriated water in the source of supply named in the application, and if such appropriation is not otherwise detrimental to the public welfare, the state engineer shall approve the same by endorsement thereon, and shall make a record of such endorsement in some proper manner in his office, and return the same so endorsed to the applicant, who shall, on receipt thereof, be authorized to proceed with such work and to take such measures as may be necessary to protect such appropriation. If there is no unappropriated water in the source of supply, or if, in the judgment of the state engineer, such appropriation is detrimental to

public interests, the state engineer shall refuse such appropriation, and the party making such application shall not prosecute such work, so long as such refusal shall continue in force; and *Provided, however,* That the state engineer may, upon examination of such application, endorse it approved for a less amount of water than the amount stated in the application, and for a less period of time for perfecting the proposed appropriation than that named in the application, and *Provided, further,* That an applicant feeling himself aggrieved by any endorsement made by the state engineer upon his application, may in writing, in an informal manner and without pleadings of any character, appeal to the board of control, and if he shall deem himself aggrieved by the order made by the board of control with reference to his application, he may take an appeal therefrom to the district court of the county in which shall be situated the point upon the proposed source of supply at which the diversion of the proposed appropriation is to be made. Such an appeal shall be perfected when the applicant shall have filed in the office of the clerk of such district court a copy of the order appealed from, certified by the secretary of the board of control, as a true copy, together with a petition to such court, setting forth appellant's reason for appeal. Such appeal shall be heard and determined upon such competent proofs as shall be adduced by applicant, and such like proofs as shall be adduced by the board of control, or some person duly authorized in its behalf."

Laws of Wyoming, 1890-91, pages 100-101.

That this method of acquiring a water right is exclusive seems to be the view of the Wyoming court.

Whalon vs. North Platte, 71 Pac. 995-998.

There can be no pretense of any compliance on the part of the respondent Howell, and it is impossible to conceive

of his having a water right in Wyoming. According to his own testimony he commenced work on the ditch in August, 1890,

Record, page 128,

but did not use any water through the ditch until the next year.

Record, page 135.

The notice which he filed states that water was first run through the ditch August 4, 1891.

Record, page 139.

He had not effected an appropriation until he actually applied the water through his ditch to the beneficial use for which he made the diversion.

Long on Irrigation, 47;

3 Farnham on Waters, 668.

Until that time his right was inchoate.

Smyth vs. Neal, 49 Pac. 850.

It was like an inchoate right of dower, subject to legislative control.

Randall vs. Krieger, 23 Wall. 137.

VII.

POINT OF DIVERSION.

The respondents fail to allege and prove that they made their appropriations on the public domain, or that they acquired the right to make their appropriation from some riparian owner. Such allegations and proof are absolutely essential, and their case must necessarily fail.

Smith vs. Denniff, 24 Mont. 20; 60 Pac. 398;

Cave vs. Tyler, 65 Pac. 1089;

City of Santa Cruz vs. Enright, 30 Pac. 197;

Gould vs. Eaton, 49 Pac. 577.

In Smith vs. Denniff the Court said:

"But this privilege or right to appropriate the

> water of a stream can in any and every case be taken advantage of or exercised only by one who has riparian rights, either as owner of the riparian land, or through a grant of the riparian owner."

As respondents' points of diversion are not situated on their lands, they must show that they have exercised this right on public domain, or state lands, or obtained the right of diversion of the owner of the soil where they make the diversion.

In Cave vs. Tyler, the court said:

> "The burden of showing the diversion was made on the public domain was upon respondents, if that fact was essential to respondents' asserted rights under the laws of Congress, as we think it was."

The contention based on these authorities was met below by the suggestion that both the California and the Montana cases, or at least Smith vs. Denniff among the latter, recognize riparian rights, and that, accordingly, it is logical for the courts of those states to hold that the riparian rights must be shown to have been extinguished, either by showing that the appropriation was made on the public domain, when that result would be accomplished by the act of 1866, or by grant from the riparian proprietors; but that, as riparian rights are not recognized in Wyoming, the authorities are inapplicable.

But that is not the basis of the doctrine at all. It was re-asserted by the Supreme Court of Montana in

Prentice v. McKay, 38 Mont. 114,

and it is there shown that the reason for the rule is that no one can claim to have acquired a right which he could have initiated only by trespass on the lands of another.

The following language is quoted from the opinion:

> "This being a suit in equity, we may inquire whether the respondent in fact made an appropria-

tion of this water in 1893 or in 1899. The water which she assumed to appropriate was produced in springs and a stream on the land in section 19 above, then owned by S. C. Prentice in fee, subject only to a mortgage to Mrs. McKay. The United States and the state of Montana have recognized the right of an individual to acquire the use of water by appropriation (Rev. Stats. U. S., secs. 2339, 2340, U. S. Comp. Stats. 1901, p. 1437); Revised Codes, secs. 4840 et seq.; Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. 726; Welch v. Garrett, 5 Idaho 649, 51 Pac. 405); but neither has authorized, nor, indeed, could authorize, one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation (see note to Heath v. Williams, 43 Am. Dec. 265, 25 Me. 209), and the statutes of this state (secs. 4840-4891, above) only apply to appropriations made on the public lands of the United States or of the state, and to such as are made by individuals who have riparian rights either as owners of riparian lands or through grants from such owners. This is the doctrine announced in Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741, where the court further said: 'A trespasser on riparian land cannot lawfully exercise there any right to such water or acquire any right therein by virtue of sections 1880 et seq. of the Civil Code of 1895 (sections 4840 et seq., Revised Codes). (Alta Land Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645.)' In the same opinion this court also said: 'One may not acquire a water right on the land of another without acquiring an easement in such land.' And again: 'An easement is an interest in land that

cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription.' Since the use of water is declared by the Constitution of this state (Article III, sec. 15) to be a public use, the right to appropriate water on the land of another may be acquired by condemnation proceedings. (Smith v. Denhiff, above; St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659.)"

The decree as to the respondent Howell should be reversed:

1. Because the court had no jurisdiction to adjudicate his rights against the petitioners, diversity of citizenship being wanting.

2. Because he never made an appropriation, or was granted leave to appropriate water in the State of Wyoming as required by its laws, and hence never made any appropriation.

3. Because whatever right he did have is barred by the statute of limitations, and by the statute of non-user.

4. Because his unexcused laches forbids the granting to him of any relief in equity.

5. Because as to the quantity awarded to him, it is unsupported by any pleading.

6. Because the quantity of water awarded to him is uncertain, indeterminate and measured by a standard unknown to the laws of Wyoming.

The decree as to the respondent Morris should be reversed:

1. Because by consenting to the resepondent Howell's becoming with him a party plaintiff, the jurisdiction of the court was lost.

2. Because whatever right he may have had is barred by the statute of non-user.

3. Because his laches forbids to him any remedy in equity.

4. Because he never effected an appropriation of more than enough water to irrigate 25 acres,—under the evidence, 25 inches.

5. Because he avers in his bill that he is entitled to, and the decree awards him, a quantity of water measured by a standard unknown to the laws of Wyoming.

6. Because the quantity of water awarded to him is uncertain and indeterminate.

It should be reversed as to both the respondents Morris and Howell:

1. Because such rights as they have in the waters of Sage Creek they have by virtue of the laws of the State of Wyoming, and to such waters only as shall be flowing in that stream in the State of Wyoming, gathered in that state or allowed to flow into it by the citizens of Montana from their state.

2. Because any right they may have in the waters of Sage Creek is necessarily subject to the rights of appellants, settlers on lands within what was the Crow Reservation, at the time of the appropriation of respondents, and appropriators of the water of the reservation.

3. Because the amount in controversy, as shown by the bill, does not exceed $2000.00, and the court had no jurisdiction for that reason.

4. Because the proofs show no appropriation by either

of the parties named, on the public land, or on private lands with the consent of the owner.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1910.

No. 129.

J. N. BEAN, W. B. BAINRIDGE, S. W. BENT, WALLACE BENT AND CORBETT BENNETT,
Petitioners,

vs.

W. A. MORRIS AND T. N. HOWELL,
Respondents.

BRIEF OF RESPONDENT AND INTERVENER T. N. HOWELL.

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Supreme Court of the United States

OCTOBER TERM, 1910.

No. 122.

J. N. BEAN, W. R. BAINRIDGE, S. W. BENT, WALLACE BENT AND CORBETT BENNETT,
Petitioners.

vs.

W. A. MORRIS AND T. N. HOWELL,
Respondents.

BRIEF OF RESPONDENT AND INTERVENER, T. N. HOWELL.

I.

STATEMENT OF CASE.

This case was originally brought in the United States Circuit Court, Ninth Circuit, District of Montana, In Equity, by William A. Morris against J. N. Bean, et al. (Tr., p. 2).

Complainant alleging, that he was at the time of the bringing of the suit and for fifteen years prior thereto, had been a resident and citizen of the Territory and State of Wyoming, and that the defendants were all citizens and residents of the Territory and State of Montana.

And, further alleging, that the amount involved in this action exceeds the sum of two thousand dollars, exclusive of interest and costs (Tr., p. 2).

The complainant, who is in this court as respondent, further alleging that he is the owner of one hundred and sixty acres of agricultural land situated in Wyoming, which he settled upon as his homestead in the spring of 1887, and thereafter

acquired patent to the land under the homestead laws of the United States. The lands being arid in character and requiring irrigation, complainant, in April, 1887, constructed a ditch by means of which he diverted water for the irrigation of his homestead from a stream known as Sage Creek. This stream rises in the Pryor Mountains in the State of Montana, and flows thence in a southerly direction into the State of Wyoming, and empties into the Shoshone River denominated and known as the Stinking Water River. The appropriation of the complainant Morris was made in Wyoming and the appropriations of the defendants, appellants and appellees are admittedly several years subsequent in time to that of the complainant Morris.

The respondent, T. N. Howell, filed his petition in intervention on September 5, 1903, by and with the written consent of all of the parties to the action, including the five appellants. At the time of filing his petition in intervention he was a citizen and resident of Wyoming. He is the owner of two hundred acres of agricultural lands situated in the State of Wyoming, for which, in August, 1890, he made an appropriation out of the waters of Sage Creek, in Wyoming. The water right of the intervener, Howell, is likewise prior in time to that of any of the defendants, appellants and appellees. Both the original complainant and intervener have used the waters of Sage Creek upon their respective ranches continuously, raising crops thereon, ever since the dates of their several appropriations, except when interfered with by the defendants, appellants and appellees, who tapped the waters of Sage Creek in Montana, above the points of diversion of complainant and intervener. An injunction was sought in this action to prevent this interference by which the complainant and intervener were being deprived of their prior rights to the waters of Sage Creek, and its tributary, Piney Creek.

Depositions were taken on behalf of all the parties to the action, and the cause referred to the Master, who reported his findings of fact and conclusions of law, which were in the main favorable to the complainant and intervener. These findings and the exceptions to them were argued before the Hon. Edward Whitson, sitting during the absence of the presiding judge of the District of Montana, and his findings of fact and conclusions of law were all in favor of the complain-

ant and intervener, and decree in their favor was thereafter duly entered and filed. His very able and learned opinion in this case is to be found reported in:

Morris *vs.* Bean, 146 Fed., 423;

Also in the Transcrip of this case, pp. 298 *et seq.*

From the judgment rendered in favor of the complainant and intervener only five of the defendants have appealed to this court, viz.: J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent, and Corbett Bennett.

II.

We respectfully submit that the facts and circumstances of this case are not such as to justify the interposition of the Supreme Court by way of certiorari.

In the syllabus to the case of Caroline M. Forsyth *vs.* City of Hammond, et al., 166 U. S., 504-506; 41 Law. Ed., 1095, we read as follows "This court will sparingly exercise the power to require a case to be certified to it by the Circuit Court of Appeals, and will exercise it only when the circumstances of the case show that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interest of the nation in its internal or external relations, demands such exercise."

The body of the case cited and other authorities set forth therein strongly sustain the above quotation.

III.

Again, we respectfully submit that the application for the writ in this case was not made within reasonable and proper time.

The decision in the Court of Appeals was rendered on the 3d day of February, 1908. The application for certiorari appears to have been made at the October term, 1908.

On this point we cite the following authorities:

The Conqueror, 166 U. S., 110, 41 Law. Ed., 937;

Panama R. Co. *vs.* Napier Shipping Co., 166 U. S., 284, 41 Law. Ed., 1005;

Bonin *vs.* Gulf Co., 198 U. S., 115, 49 Law. Ed., 970;
Ayres *vs.* Polsdorfer, 187 U. S., 585, 47 Law. Ed., 314.

IV.

On page 7 of Petitioners' Brief we find the heading, "Extent of Complainant's Right." Then, on page 25, under the heading, "Argument" and "Jurisdiction of Court," we find the subheading, "Amount in Controversy." Again, under "Specifications of Error," Petitioners' Brief, "IV," we have the following:

> "It was error in the court to hold that the amount in controversy between the respondent Morris and petitioners exceeded $2,000.00, or that the court upon the averments of the bill or under the proofs had any jurisdiction of the subject-matter, and it was error to enter any decree herein, for that it appears from the bill of complaint that the amount in controvery does not exceed $2,000.00, and that, therefore, the Circuit Court had no jurisdiction of the subject-matter of the action."

Complainant alleged in his bill of complaint that the amount involved in this action exceeds the sum of $2,000.00, exclusive of interest and costs. The Act of Congress of March 3, 1891, conferred jurisdiction upon Circuit Courts of the United States in suits where there is a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000.00. In this action there is a controversy between citizens of Wyoming on the one side and citizens of Montana on the other side, and the matter or thing in dispute is the water rights of the Wyoming appropriators. The jurisdiction, then, rests upon the value of the water right of the complainant, W. A. Morris, who, as a citizen of Wyoming, instituted this action. The appellants denied in their answer that the amount in dispute exceed $2,000.00. There was a straight issue, then, of the fact as to whether the water right, the thing in dispute, did exceed the sum or value of $2,000.00. If it did, the Circuit Court had jurisdiction. Some eight witnesses testified as to the value of the water rights of the complainant and intervener, respectively. Most of the witnesses gave their

depositions in response to written interrogatories. The following interrogatory was propounded to them:

> Int. XII. "State the value of the water right of W. A. Morris and T. N. Howell, respectively." (Tr., p. 93.)

James F. Lampman testified:

> "The value of a water right is whatsoever a ranch is worth, without buildings and fences, for, without water, land in this section of the country is not worth the Government price of $1.25 per acre, and the ranches of W. A. Morris and T. N. Howell in this locality where their ranches are located, land is worth and would sell readily for a price ranging from $20.00 to $30.00 per acre, with a good and sufficient water right." (Tr., p. 93.)

Charles A. Sarver testified (Int. XII and XIII, Tr., p. 94):

> "Whatsoever the value of the property is, without the fences or buildings, for land in this section of the country is worthless and would not be worth the taxes that are assessed against it, without water to irrigate. At the time that Mr. Morris and T. N. Howell settled upon their land there was sufficient water flowing in Sage Creek to thoroughly and permanently irrigate the said ranches of W. A. Morris and T. N. Howell during the irrigating season if allowed to come down, and it did flow during the time that I stated above, and I consider W. A. Morris' and T. N. Howell's ranches, they being in a locality that is contiguous to a range for stock, would readily sell for $40.00 an acre, with a good and sufficient water right, and there is upon W. A. Morris' ranch 240 acres that could easily be watered from Sage Creek, if the water was not molested by parties in Montana." (Tr., p. 94.)

James F. Howell (not the intervener), testified:

> "A water right, the value of which is the amount that you could get for your ranch per acre, less the improvements thereon in the way of buildings and fences, for in this locality land is considered worthless without water and would not sell for the price the Government asked for it; but those ranches, with a good and sufficient amount of water to sufficiently irrigate, would bring upon the market to-day the price of $30.00 an acre." (Tr., p. 95.)

Owen G. Norton testified:

> "The value of the water right is what the ranch would sell for, for without water a ranch is worthless and would not pay the price of the taxes assessed against it." (Tr., p. 96.)

Richard B. Heritage testified:

> "The water right is considered to be worth whatsoever a ranch would bring upon the market without any improvements in the shape of buildings and fences, for without water sufficient to thoroughly irrigate a ranch, the ranch is worthless." (Int. XII, Tr., p. 98.)

Joseph N. Howell (not the intervener) testified:

> "A water right is worth whatsoever the ranch or ranches would sell for, for a ranch without water is worthless, and no one could exist on the same, and either of those ranches would sell quickly for $20.00 or $30.00 an acre, as they are in a good locality and consist of very rich soil." (Int. XII, Tr., p. 99.)

All of the above witnesses testified that the Complainant Morris and Intervener Howell each had ample and sufficient water to thoroughly irrigate their lands prior to the diversion of the water by the parties in Montana.

The complainant, W. A. Morris, was asked the following question:

> "Q. What have you got to say as to its being arid and requiring irrigation to make it produce crops?"
> "A. If you ain't got water you can't raise a thing on it; you have got to have water or the land is no good." (Tr., p. 113.)

The intervener, T. N. Howell, testified as follows:

> "Q. What have you got to say as to the necessity of the use of water to make it produce?"
> "A. It wouldn't be worth a cent without water."
> "Q. What is your land worth?"
> "A. About $25.00 an acre."
> "Q. Now, what is the water worth?"
> "A. About the same; the land wouldn't be worth anything without the water."
> "Q. I will ask you what you have to say as to Morris' land and water right?"

"A. I think his is about the same." (Tr., p. 128.)

From the above testimony it appears that the value of the Morris water right is from $3,200.00 to $4,800.00, and the value of the Howell water right is from $4,000.00 to $6,000.00. The court, therefore, did right in finding that the amount in controversy, in this suit exceeds $2,000.00, and the amount involved in this case is ample to sustain the jurisdiction of the court.

Rayney *vs.* Herbert, 55 Fed., 443;
Miss. & Mo. R. Company *vs.* Ward, 67 U. S., 485
Stinson *vs.* Dousman, 20 How., 461. S. C. 2 Miller, 525.

Upon the question of "Amount In Controversy," we cite the following:

Smithers *vs.* Smith, 204 U. S., 632, 51 Law. Ed., 656;
Put-in-Bay Water Works, Light & R. Company *vs.* Ryan, 181 U. S., 409, 45 Law. Ed., 927;
Wyley *vs.* Sinkler, 179 U. S., 58, 45 Law. Ed., 84.

V.

The point appears to be made for petitioners that the Bill of Complaint does not properly aver the amount in controversy as exceeding two thousand dollars. This received careful consideration from the learned judge in the decision in the Circuit Court, page 429, and after reciting the testimony and authorities, the court said:

> "Complainant will be given leave to amend his bill to conform to the proofs upon this view."

On page 9 of "Petitioners' Brief" we find the heading, "Citizenship of Intervener." Then, on page 29, under the heading, "Argument" and "Jurisdiction of Court," we find a similar heading.

It is contended that the intervener, Howell, was not a citizen of Wyoming, and also that the jurisdiction failed because of his alleged citizenship.

Error X is assigned because the appellants allege that Howell was not a citizen of Wyoming, but was a citizen of Montana,

and that the court erred in permitting him to file his petition in intervention and that the court should have dismissed his petition, for the reason that the jurisdiction of the court fails with the failure of the complainant Morris to sustain his right of action. The last ground, of course, need not be considered, since we have shown conclusively that the complainant Morris did sustain his right of action and has a good and valid appropriation of the waters of Sage Creek, and being admittedly a citizen and resident of the State of Wyoming, the jurisdiction of the court would attach, regardless of whether Howell is a citizen of Wyoming or of Montana. We are a little surprised that the appellants should urge as error the action of the court in permitting T. N. Howell to file his petition in intervention, when all of the appellants gave written consent to the filing of said petition in intervention, as well as the other defendants in the case. (Tr., pp. 31 and 32.)

The court below having acquired jurisdiction by reason of the diverse citizenship of the complainant Morris and the defendants, it was not error to permit Howell to intervene to protect his rights regardless of his citizenship.

Conwell *vs.* White Water Valley Canal Company, Federal Cases No. 3148;

Osborne & Company *vs.* Barge, 30 Fed., 805.

Belmont Nail Company *vs.* Columbia Iron and Steel Company, 46 Fed., 336.

T. N. Howell swears in his petition in intervention (Tr., pp. 26 *et seq.*), verified on the 11th day of August, 1903, and filed September 5, 1903, that he is now and for twelve years past, has been a citizen of the United States, and of the Territory, now State, of Wyoming. Mr. Howell testifies that he was a resident at the time of giving his testimony in Billings, Mont., but had formerly resided in the Stinking Water County, Fremont County, Wyoming (Tr., p. 27). Mr. Howell may, after 1897, have gone to Billings and may have lived there temporarily while looking after his action against these defendants, but it is apparent that he was a citizen as well as a resident of Wyoming at the time he filed his petition in intervention in 1903. On February 6, 1903, we find from the receipt issued by the Receiver of the United States Land Office at Lander,

Wyoming, that Thomas N. Howell was at that time a resident of Big Horn County, State of Wyoming (Tr., p. 141, Rec. Receipt, Ex. A). The sworn statement of claim to water gives the postoffice address of Howell as Lovell, Wyoming. (Tr., p 139, Pltff. Ex. B-3.)

The question as to what place a party considers his home or residence is a matter of intent of the party himself. Temporary absence at Billings, Mont., would not change the residence of Howell nor make him a citizen of Montana, and there is no proof that he is a citizen of Montana, but all the proof goes to show that he is a citizen of Wyoming. However, it is immaterial in this case whether he is a citizen of Montana or Wyoming.

In the case of Miller & Lux *vs.* Rickey et al., and other cases, 146 Fed., 574, we have the following:

> "The suggestion is made that this court has no jurisdiction of certain cross-bills because the parties thereto are citizens of the same State. This is without merit. The cross-bills are all ancillary to the original suit of Miller & Lux *vs.* Rickey, et al. (No. 731). The principle is well settled that a cross-bill of this character is not an original suit, but it ancillary and dependent, supplementary merely, to the original suit out of which it arises, and is maintained without reference to the citizenship and residence of the party. It does not depend upon the citizenship of the party, but of the subject-matter of the litigation."

Many citations of authorities are there made to support the text.

It will be noted that in the said case of Miller & Lux *vs.* Rickey et al. the issues and facts were precisely the same as in this case, to-wit: an action brought in the Circuit Court for the District of Nevada by Miller & Lux as appropriators of water in the State of Nevada to restrain the defendants from taking water from the same stream in the State of California where said stream had its rise.

Again, in the case of Ames Realty Co. *vs.* Big Indian Mining Co. et al., 146 Fed., 166, we find the following:

> "The rule is that consolidations, cross-bills, and interventions do not oust the jurisdiction of the court in the main suit, whatever the citizenship of the parties thus brought in may be."

Many citations of authorities are there made to support the text.

In the case of Rickey Land & Cattle Co., petitioner, *vs.* Miller & Lux (No. 5), being the same case above referred to as Miller & Lux *vs.* Rickey et al. on certiorari to the Supreme Court, decided November 7, 1910, we find the following:

> "It is urged that the cross-bills on which the bill and injunction in the second case were based were not maintainable because not made in the defences of the original suit of Miller & Lux. But it might very well be, as shown by the argument to the respondent that even if they admitted the right of Miller & Lux, still a decree as between themselves and other defendants would be necessary in order to prevent a decree for Miller & Lux from working justice. See, further, Ames Realty Co. *vs.* Big Indian Min. Co., 146 Fed., 166. The cross-bills being maintainable, the jurisdiction in respect of them follows that over the principal bill."

VI.

On page 15 of petitioners' brief we find the heading, "Laches, Abandonment, Non-user and Statute of Limitations," and on page 77, under the heading "Argument," we find the sub-heading "Laches, Adverse-user and Abandonment," and on page 18 the heading, "Estoppel."

Error XI is assigned by appellants asserting that the complainant and intervener are estopped from maintaining this action, and Error X is urged to show that the complainant and intervener are guilty of laches. It is contended on the part of the appellants that the complainant and intervener should not be allowed to set up their rights to the waters of Sage Creek, because they knew that the appellants were making improvements on their ranches, and depended upon the use of these waters to sustain them. It can be said with equal, if not with greater force, that the appellants knew that the complainant and intervener had made improvements upon their ranches, had cultivated and tilled the soil, and had been raising large crops thereon for many years prior to their locations in Montana, and were so doing at the time of their settlements, and were dependent upon their prior appropriations of the waters of Sage Creek for these purposes. It occurs to us that if anyone should be stopped it is the appellants.

> "Estoppel by conduct is where a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice; and estoppel by laches is where a person neglects to do something which he should do, or fails to enforce a right at a proper time."
>
> 16 Cyc., 680.

What conduct of either the complainant or intervener has led either of the appellants to believe that he had a prior water right to them? What neglect have either complainant or intervener been guilty of? Have the Wyoming appropriators concealed anything from the Montana appropriators, which has led them to place valuable improvements upon their lands, to their prejudice? What fraud have the Wyoming appropriators perpetrated upon the Montana appropriators? What facts have they withheld? None whatever. The conduct and acts of the Wyoming appropriators have been such all the time as to put the Montana appropriators on their guard, and if they expended money in seeding their lands and placing improvements thereon, dependent upon the water right to which they had a junior appropriation, they did so at their own risk. The fertile fields of the low-landers in Wyoming depending for their fertility upon the waters of Sage Creek, were in full view of the high-landers in Montana. The repeated demands of the Wyoming appropriators upon the Montana appropriators, and the suits that were instituted, were certainly sufficient warning to them not to invest their money in such precarious and uncertain an enterprise, and if they did do so, they did it at their own peril, and they cannot now say that the Wyoming appropriators are guilty of laches and should be estopped.

The case of Rigney *vs.* Tacoma Light and Water Company, 38 Pac., 147, is a leading authority upon the question of estoppel and laches in reference to water rights. The defendant company furnished water to the city of Tacoma, and in order to do so made connections and built its structures at great expense in bringing the water to the city from the source of supply. The plaintiff stood by and made no objections to the company expending these large sums of money and waited for about ten years before he brought this suit for an injunction against the company to restrain them from taking the water. It is asserted that the plaintiff has virtually slept upon the right

he now claims for a period of ten years and allowed the defendants to expend large sums of money in structures and improvements. The court held in this case, page 150, second column:

"The case seems to be wanting in the essential elements of an estoppel proper." An estoppel is well defined by Judge Peckham in Rubber Co. *vs.* Rothery, 107 N. Y., 310, as follows: "To constitute it (an estoppel) the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or, that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make The other party, too, must have acted upon the strength of such admission or conduct." It is not shown that either the plaintiff or his grantor did any act or make any admission with the intention of influencing the conduct of the defendants, or, that the latter did the acts complained of by reason of any acts or admissions on the part of the former. The principle of estoppel is, therefore, inapplicable here.

But it is claimed that at all events the kindred and analogous principle of acquiescence or laches is applicable and constitutes a complete bar to the action. It is true that this action was not commenced against the defendant corporation until nearly nine years after it began to divert the waters from the premises now owned by the plaintiff. It is true also that courts of equity, in the exercise of a sound discretion have often refused to suitors soliciting their intervention who have failed to assert their rights in court as promptly as they should have done; but it by no means follows that in no case will relief be granted in equity where there has been considerable delay in applying for it. It is often remarked by courts and text writers that courts of equity will refuse relief to stale demands, but even in cases where delay is allowed to operate as a defense the question is to be determined in the discretion of the court upon all of the circumstances of the case. If it appears in any particular case that the laches of the complainant have not been such as to show his assent to the acts complained of and their consequences, he ought not to be turned out of court simply because he might have begun his action sooner.

The opinion of the court in this case is condensed in the following syllibi:

"Where it is not shown that either the plaintiff or his grantor did any act or made any admission with the intention of influencing the conduct of the defendants, or that defendants did the acts complained of by reason of any acts or admissions on the part of the plaintiff, the principle of estoppel is inapplicable."

"In a suit commenced nine years after defendant began to divert water from plaintiff's premises, it appearing that none of the flumes, dams, and other structures causing such diversion were erected on plaintiff's land, that defendant had full knowledge of plaintiff's rights, and that plaintiff had never assented to such acts of defendant, and, on remonstrating, was told that such use of the water was to be only temporary, held, that defendant could not set up laches or acquiescence on the part of plaintiff."

In the case of Galway *vs.* Metropolitan Railway, 128 N. Y., 132, it is held:

"No lapse of time or inaction merely on the part of an owner after the erection and during the maintenance of the unlawful structure, unless it has continued for such a period of time as will affect a change of title in the property or authorize the presumption of a grant, is sufficient to defeat the right of the owner to his action at law or equity."

"Where a legal right is involved, and upon grounds of equity jurisdiction, the courts have been called upon to sustain the legal right, the mere laches of a party, unaccompanied by circumstances amounting to an estoppel, constitute no defense."

In the case of the New York Rubber Company *vs.* Rothery, et al., 107 N. Y., 310, it is held:

"To constitute an equitable estoppel there must have been some act or admission by the party so sought to be estopped, inconsistent with a claim he now makes, and done or made with the intention of influencing the conduct of another which he has reason to believe would, and which did, in fact, have that effect. Silence will not estop unless there is not only a right, but a duty to speak."

In the case of the Lower Latham Ditch Company *vs.* Louden Irrigating Canal Company, 60 Pac., 629 (Colo., 1900), the court held, Laches:

> "The fact that plaintiff knew for several years that his shortage in water supply was caused by diversion of the water of a stream by defendant's ditch, and made no protest, does not show any laches or acquiescence on his part amounting to an abandonment of his decreed priority."

The same court held on the question of Estoppel:

> "The fact that the plaintiff knew of the diversion of water by defendant's ditch for several years, without interfering with the same, did not constitute an *estoppel*, where there was no evidence that by his conduct he intended to deceive, or was guilty of such negligence as amounted to fraud, or that the party diverting the water was not only destitute of all knowledge regarding the state of his title, but of the means of acquiring such knowledge."

In the case of Smyth *vs.* Neal, 49 Pac., 850, in an opinion by Judge Wolverton, it is held:

> "Plaintiff, by making favorable representations to defendant of the desirability of his neighborhood for settlement, and by discussing methods for irrigation, and stating that he thought the supply of water from the creek was sufficient for them both (the defendant having used the water from 1886 to 1895), and making no objection to his use of the water therefrom, is not estopped to claim a superior right to so much of the water as prior to and during all such time he had been using it for beneficial purposes, to the knowledge of the defendant."

The case of Biddle Boogs *vs.* The Merced Mining Company, 14 Pac., 279, has been extensively cited and referred to upon the proposition which this case holds, page 368, "that there must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title, the effect of the estoppel being to forfeit his property and transfer its enjoyment to another."

See also—

Stockman *vs.* Riverside L. & I. Co., 64 Cal., 59;
Anaheim Water Co. *vs.* Semi-Tropic W. Co., 64 Cal., 195;
Lux *vs.* Haggin, 69 Cal., 266;

Meyendorf *vs.* Frohner, 3 Mont., 321;
Brant *vs.* Virginia Co., 93 U. S., 336;
Menendez *vs.* Holt, 145 U. S., 368, 12 Sup. Ct., 873;
Farmers, Etc., Bank *vs.* Farwell, 58 Fed., 639.

From the above authorities and the testimony in the case there is no principle of estoppel which the appellants can call to their aid, and the doctrine of laches cannot be relied upon by them.

It would be very much in point for us to quote here also from the opinion and decision of the learned judge who heard this case in the District Court. We do not deem it necessary, however, to make such quotation, as we think it sufficient merely to give the reference. Under the heading, "Statute of Limitations," "Abandonment," and "Estoppel and Laches," at pages 533-435 of 146 Fed., these points are very fully presented in said opinion and decision. The appellants allege that the complainant and intervener have lost whatever rights they had in the waters of Sage Creek by abandonment and assigns Error XII for failure and refusal of the court to so find. Abandonment is like the statute of limitations and estoppel, and any other material defense, it must be pleaded in order to make it available by the defendants. Neither the petitioners, nor any of the defendants have pleaded abandonment; therfore it should not be considered in this controversy.

Morenhaut *vs.* Wilson, 52 Cal., 263;
Johnson *vs.* McLaughlin, 1 Ariz., 502;
Wulf *vs.* Manuel, 9 Mont., 286.

The statute of Wyoming provides that the failure to use water appropriated for a period of two years shall be construed as an abandonment, and it is evident that the petitioners seek to avail themselves of this provision of the Wyoming statute. But, the abandonment contemplated by the Wyoming statute is a *voluntary* abandonment and not a *forced* discontinuance of the user brought about by the taking of the water from one by the very parties seeking to defeat their rights because of such non-user.

To constitute an abandonment the acts of the party must be done voluntarily.

Landes *vs.* Perkins, 14 Mo., 238;
Morenhaut *vs.* Wilson, 52 Cal., 263;
Myers *vs.* Spooner, 55 Cal., 261;
Wyman *vs.* Hurlburt, 40 Am. Dec., 465.

A failure to use water for the purpose for which it was appropriated will not constitute an abandonment, if, during the years in which it was not used there was not a sufficient quantity of water to supply the requisite amount for that purpose.

McCauley *vs.* McKeig, 8 Mont., 389.

The fact that the petitioners took the water from the respondents herein, so that they could not use it profitably, or at all, estops them from alleging or proving an abandonment on their part. Testimony was introduced in behalf of Morris and Howell showing that they were deprived of the use of water, and the resultant injury to their crops as bearing on the question of damages. From this testimony it is evident that there was no abandonment of their water rights by said respondents or either of them.

T. N. Howell testified that he raised splendid crops upon his place with the waters of Sage Creek in 1891, 1892, and 1893; that he put in a big crop in 1894, in fact, nearly all his place, but that the defendants took his water in June and dried it up. He put in big crops in 1895, 1896, and 1897, but each year the defendants, by their wrongful diversions, took his water and dried up his crops (Tr., p. 129). The witness says: "I sowed the biggest crop in 1897; I sowed seventy acres in 1897; that's the last crop I sowed. I said yesterday '96, but I was looking over my books and I find I tried to raise four crops instead of three and lost four crops in '94-'95-'6-'7." Tr., p. 52.)

He says: "It was no use to try it until I got water." He made demands upon those higher up the stream for the water, some had refused and some had promised to let it down to him. But he didn't abandon his water right. After his four unsuccessful attempts to raise crops and his fruitless personal appeals we find Howell instituting suits and appealing to the courts to establish his right to the waters of Sage Creek, and to enjoin the up-stream appropriators from interfering with his right. The case of Howell *vs.* Johnson et al. reported in

89 Fed., 556, shows that a demurrer was passed upon involving his right to the waters of Sage Creek on August 20, 1898. He evidently instituted the suit prior to that date, or immediately after his failure to raise a crop in 1897. He testified in this action that he commenced a suit against some of these defendants in the Circuit Court of the United States, for the District of Montana and got a decree against them. (Tr., p. 135.)

The decree referred to is found in the case of *In re* Huntley, 85 Fed., 889, 29 C. C. A., 468.

This was an appeal from an order adjudging the defendants guilty of contempt of court for the violation of the provisions of a decree rendered and entered in an action instituted by the respondent Howell herein, against a number of the appropriators of Sage Creek, in Montana. The decree being in favor of the said Howell. This makes two suits brought by Howell to enforce his water right. It is apparent that the respondent Howell, far from abandoning his right, has been very energetic and persistent in his efforts to assert it on more than one occasion in court. All the facts go to show that the respondent Howell was and ever has been very tenacious in holding on to his water right and in every way endeavoring to maintain, assert and preserve his rights instead of abandoning them.

VII.

On page 34 of petitioner's brief we find the heading "Origin of a Water Right—The Nation of the State?"

An effort is made through 40 pages of said brief to establish the claim that the Nation or the general Government is not the origin of the rights in question here, but that the rights depend entirely upon the laws of the States involved. It is contended from this that the State of Montana can dispose of the waters within its borders regardless of any rights theretofore acquired in Wyoming by the citizens thereof.

It is conceded in this petitioner's brief that the authorities are against their contention, yet still a great effort is made by them to sustain it.

We believe that we may be content to refer as heretofore to the opinion and decision of the learned judge who tried this case in the District Court. In pages 429 to 431 of said decision in 146 Fed., this question is most thoroughly discussed, and it

seems to us finally settled. A number of authorities are cited to support the said decision.

In the late case of Rickey Land & Cattle Company, Petitioners, *vs.* Miller & Lux, on certiorari to the Supreme Court of the United States, decided November 7, 1910, we find the same state of facts as in the case at bar. In that case the stream rose in the State of California, and the Rickey Land & Cattle Company as the successor of one Rickey, claimed the water in California, while Miller & Lux claimed prior rights upon the same stream in the State of Nevada. While this particular point seems not to have been made in the Supreme Court, it seems to us that the decision by that court implies the indorsement of the doctrine or principle claimed by Miller & Lux.

VIII.

On page 74 of petitioners' brief we find the heading, "The rights acquired in Wyoming were subordinate to the rights acquired in and on the Crow Indian Reservation in Montana."

Upon this point, we again wish to refer to the said opinion and decision of this case in the District Court. Under the head of "Riparian Rights" and at pages 431 to 433 of said decision in 146 Fed., we find a very clear and exhaustive discussion of this question. It seems to be entirely unnecessary to undertake to add anything thereto.

On behalf of the petitioners there is only one authority cited, which is that of Winters *vs.* United States, 207 U. S., 564. It does not seem to us that that decision at all upholds the contention made. From that case we quote as follows: "The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant." The court then goes on to discuss the elements of said agreement, and they are such as to make the case not at all applicable to the one at bar.

There is a very fine discussion and presentation of this point and claim in the brief of the complainant and intervener in the United States Circuit Court of Appeals, in pages 43 to 61

thereof. We presume that this brief is on file and a part of the record now before the Supreme Court, and we beg leave to refer to said brief and to said discussion therein, as it seems entirely unnecessary to us to quote those pages. We cite some of the authorities contained therein, however, as follows:

Long on Irrigation, Sec. 72;
Howell *vs.* Johnson, 89 Fed., 556;
Morris *vs.* Bean, 123 Fed., 618;
Hoge *vs.* Eaton, 135 Fed., 411;
Anderson *vs.* Bassman, 140 Fed., 14;
Willey *vs.* Decker, 73 Pac., 210;
Conant *vs.* Deet Creek, 66 Pac., 188;
Pine *vs.* Mayor of New York, 112 Fed., 98;
Holyoke Water Co. *vs.* Connecticut River Co., 20 Fed., 71;
Rutz *vs.* City of St. Louis, 7 Fed., 438;
4 Amer. Law Reg., 385;
New Hampshire *vs.* Louisiana, 103 U. S., 76, 90;
Rossmiller *vs.* State, 89 N. W., 839;
Perkins County *vs.* Graff, 114 Fed., 441.

Error XIII is assigned because the learned judge did not find or rule that the waters of said creek during the irrigating season do not sink in the channel thereof and that said respondents would not have had water even if the said petitioners had not used the water of said creek. There is absolutely no testimony to warrant the court in so finding, but, to the contrary, the evidence is very conclusive that said respondents had abundant water until the diversion and use thereof by the petitioners. James F. Lampman, in response to Int. VIII, IX and X, testified that he had seen the water flow in sufficient quantities during the irrigating season sufficient to irrigate the ranches of said W. A. Morris and T. N. Howell before said waters were appropriated by the defendants (petitioners herein). (Tr., p. 93.)

James F. Howell (not the respondent) testified in response to Int. VIII, IX and X, That if the water was unmolested by the parties in Montana, it would flow in sufficient quantities during the irrigating season to thoroughly and permanently irrigate the ranches of the said W. A. Morris and T. N. Howell

and that prior to the appropriation of the water by parties in Montana the said W. A. Morris and T. N. Howell had sufficient water to thoroughly irrigate their ranches during the irrigating season, and that the said water did flow onto the said ranches in the years 1892-3 in sufficient quantities to thoroughly irrigate the same. (Tr., p. 95.)

Practically the same testimony is given by Owen G. Norton (Tr., p. 95) and by Richard B. Heritage (Tr., p. 98) and by Joseph M. Howell (Tr., p. 98).

The respondent T. N. Howell respectfully submits:

1. That the diversity of citizenship is clearly established, giving court jurisdiction.

2. That said respondent made and was granted an appropriation of water in the State of Wyoming, of which the citizens of another State cannot lawfully deprive him.

3. That he was never barred by the Statutes of Limitations, or by the statute of non-user.

4. That he has never been guilty of laches, but, on the contrary, exceedingly diligent in his effort to protect his rights.

5. That the sixth section of respondent's petition alleges the amount of water appropriated and the ninth section thereof definitely asserts the amount used and enjoyed.

6. That the amount of water awarded is certain, and determinate and measured by a well recognized mode of measurement and so found by the Master in Chancery to whom said cause was referred.

IX.

A few other points are presented in the brief of petitioners, but we do not deem them of sufficient importance to require any particular discussion by us.

Especially as they are so fully covered by the opinion of the learned judge who tried the case in the Circuit Court.

146 Fed., 423, also Tr., p. 298,

and affirmed by the opinion of the United States Circuit Court of Appeals, in the opinion written by the Hon. Judge DeHaven (Tr., p. 325).

On behalf of the (intervener below) respondent herein, T.

N. Howell, we respectfully submit that the decree should be affirmed.

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